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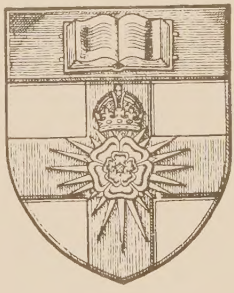

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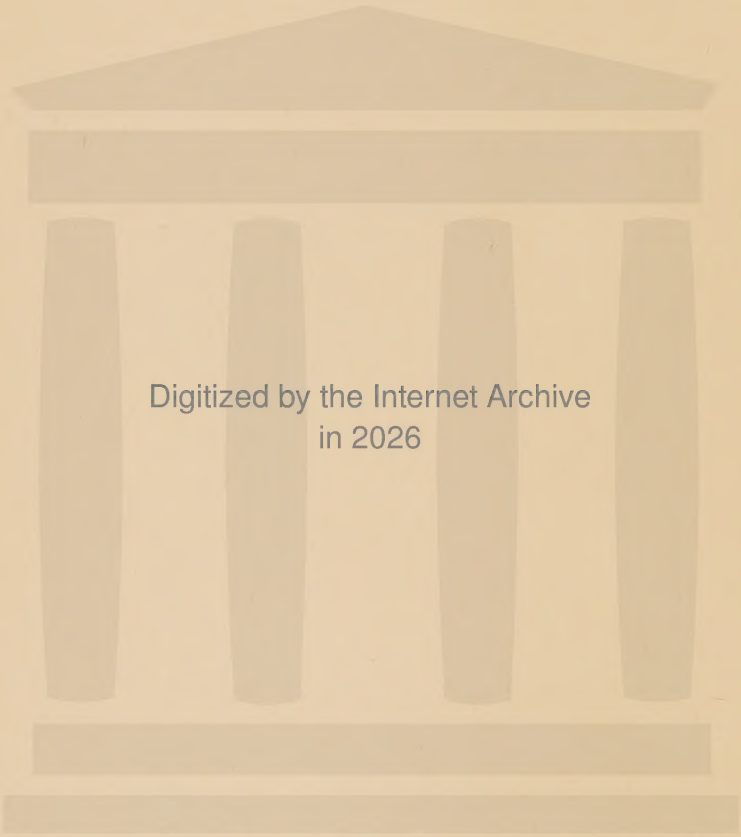
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

C. A.
1907
Feb. 1.

McMANUS *v.* FORTESCUE AND ANOTHER.

Auctioneer—Personal Liability—Sale subject to Reserve—Lot knocked down at less than Reserve.

At a sale by auction subject to a reserve price on the article sold, where the fact that there is a reserve is known, the offer of the auctioneer to sell, the bidding, and the knocking down of the article to the highest bidder are all subject to the condition that the reserve price should be reached, and the fact that the auctioneer knocks down the article to a bidder who has bid a less price than the reserve gives the latter no right of action against the auctioneer, either for breach of duty in refusing to sign a memorandum of or otherwise complete the contract, or for breach of warranty of authority to accept the bid.

APPEAL from a judgment of Phillimore J. at the trial of the action.

The defendant was an auctioneer of the name of Branson, carrying on business under the style of Fortescue & Branson.

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McMANUS v. FORTESCUE.

The action arose out of an auction conducted by Branson of certain property, described in a printed catalogue and conditions, and belonging to the guardians of the parish of Hammersmith, and arose in connection with one of the lots put up for auction. This lot was a large corrugated iron building containing twelve rooms, with the various fittings which were described, and the dwarf walls upon which the buildings were fixed. The plaintiff, in his statement of claim, averred that he bid for the lot, that his bid was accepted, and that the lot was thereupon knocked down to him. In paragraph 3 the plaintiff averred that he authorized and gave a mandate to the defendant to act as his agent and sign a memorandum of a contract of sale of the lot and otherwise complete the contract on his behalf, and that the defendant, by knocking down the lot to the plaintiff, accepted the authority and mandate. In paragraph 4 the plaintiff averred that the defendant, in breach of his duty under the before-mentioned mandate and authority, neglected and refused to sign a memorandum of the contract or otherwise complete the same on behalf of the plaintiff, who had in consequence been unable to obtain possession of the lot, and had lost the benefit of the same and had suffered damage. The defence admitted the offering of the property for sale, but subject to a reserve. The other allegations of the statement of claim were denied. At the trial evidence was called on behalf of the plaintiff to shew that he had bid 85*l.* for the lot, and that it was knocked down to him. It appeared that the auctioneer then discovered or recollected that the reserve in respect of this lot was 200*l.*, and he consequently withdrew the lot, and refused to sign a memorandum of sale or to accept a deposit from the plaintiff. One of the conditions of sale in the printed catalogue was "each lot will be offered subject to a reserve price, and the vendors reserve the right of bidding up to such reserve price. The highest bidder for each lot shall be the purchaser," followed by a provision as to disputes. After the plaintiff's case was concluded the learned judge pointed out that the action was brought against the defendant for breach of his duty by refusing to sign the memorandum or otherwise complete the sale. He held that there was no such duty in law. An application for leave to

amend by adding a claim for breach of warranty on the part of the defendant that he had a right to sell the lot at the price at which he had knocked it down was refused by the learned judge upon the ground that the result would be nominal damages only.

Judgment was entered for the defendant.

The plaintiff appealed.

C. A. Russell, K.C., and *Disturnal*, for the plaintiff. If an article is sold without reserve by auction and knocked down to the highest bidder, he is entitled to have his contract to purchase completed. The effect of a notification of a sale subject to a reserve is that the auctioneer may withdraw the lot if no bid reaches the reserve price, but the existence of a reserve does not affect the position of a bidder to whom the lot is knocked down, or operate as a limit which prevents the auctioneer from making an effectual sale. The lot which was knocked down to the plaintiff was a corrugated iron building resting on bricks, and a purchaser would have to break it up and carry away the different portions, which by severance would become chattels. The Sale of Goods Act, 1893, is applicable to such a case, and by s. 58, sub-s. 2, "a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner." When the sale is complete the auctioneer becomes the agent of the purchaser to sign a memorandum and so create a contract binding on the vendor. The complaint in this case is that there was a breach of duty on the part of the auctioneer which led to damage to the plaintiff, who was deprived of his right to enforce the sale against the vendor or to recover damages from him. *Peirce* v. *Corf* (1) was an action by a vendor, and Blackburn J. pointed out that it was the duty of the auctioneer to take reasonable and proper care that the contract of sale was binding. The duty to the purchaser must be the same, for he and the vendor stand in the same relation to the auctioneer, who is agent for both. *Warlow* v. *Harrison* (2) is an authority that an auctioneer may be liable to the highest bidder

(1) (1874) L. R. 9 Q. B. 210, at p. 214.

(2) (1859) 1 E. & E. 309; 29 L. J. (Q.B.) 14.

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for the article to be sold, on a declaration that the defendant had undertaken to sell it without reserve. In this case the fact that there was a reserve must be taken to have been known to the plaintiff, but the amount was unknown. An auctioneer has an implied authority to sell without reserve, and, if he does so, the vendor cannot set up against the buyer a limitation of that authority not made known to the buyer: *Rainbow* v. *Howkins* (1); and similarly the auctioneer cannot set up such a limitation in answer to an action by a bidder to whom the lot has been knocked down.

Dealing with the case upon the assumption that the auctioneer's authority was limited, he is still liable for a breach of warranty that he had authority to sell. That cause of action is sufficiently indicated in the statement of claim, which clearly involves an assertion of the authority of the auctioneer to knock down the lot; but if an amendment is necessary it should have been allowed, as in *Warlow* v. *Harrison*. (2) The amendment would not involve merely nominal damages, which was the ground of the refusal by the learned judge to allow it, for if the duty of the auctioneer is established the breach of it would involve damage to the plaintiff. [They cited also *Johnston* v. *Boyes* (3); *Laird* v. *Briggs*. (4)]

McCall, K.C., and *G. A. Scott*, for the defendant, were not called on.

COLLINS M.R. This action is brought against an auctioneer, and the claim of the plaintiff is framed upon the contention that when an auctioneer has let the hammer fall after a bid he becomes the agent of the bidder to write his name to a memorandum of the contract of sale. But it is not enough that the auctioneer should become the agent of the bidder for that purpose, for the auctioneer must also be in a position to write the vendor's name in order to make a sufficient memorandum to satisfy what was formerly required under s. 17 of the Statute of Frauds, and is now necessary under s. 4 of the Sale of Goods Act, 1893. The learned judge who tried the case held

(1) [1904] 2 K. B. 322.
(2) 1 E. & E. 309; 29 L. J. (Q.B.) 14.
(3) [1899] 2 Ch. 73.
(4) (1880) 16 Ch. D. 440; (1881) 19 Ch. D. 22.

that the falling of the hammer did not create an obligation on the auctioneer to make a legally perfect contract between the vendor and the bidder. In this case the offer of each lot was subject to a reserve price, and if that price was beyond the amount at which the lot was knocked down there was no authority on the part of the auctioneer to complete the sale. The learned judge held, therefore, that the plaintiff had failed to make out his case, but an application was made to amend the claim to one of breach of warranty on the part of the auctioneer that he had authority to sell the lot at the price at which it was knocked down. This application was refused upon the ground that the damages in such a case would be only nominal. I am of opinion that the decision of the learned judge was right in the view that he took as to the duty of the auctioneer, and that even if the amendment were taken to be made, it does not carry the plaintiff's case further.

The sale took place under conditions of which the second is that each lot would be offered subject to a reserve price, and the fact lies at the root of the discussion that every bid is made subject to that condition. What, then, is the meaning in such a case of the fall of the hammer? Under the authorities that have been cited it appears that it amounts to an acceptance of the offer of the bidder, but that offer was, as I have said, conditional on the reserve price being reached, and a conditional offer cannot be treated as a general and unconditional one. The condition cannot be lost sight of, and a conditional acceptance by the auctioneer of a conditional offer by the bidder cannot amount to a binding contract to sell, unless some custom is proved that it shall be so treated, and of that there was no evidence. No authority has been cited to shew that the fall of the hammer could do away with a condition expressly stipulated for by the conditions of sale. This view of the case disposes of the claim arising from the suggested duty of the auctioneer to act as the agent of the bidder, and to complete the contract on his behalf, and it also disposes of the alternative claim which it was sought to raise by an amendment, founded on breach of warranty of authority to sell at the price at which the lot was knocked down.

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With regard to the case of *Rainbow* v. *Howkins* (1), which has been cited in support of the plaintiff's case, in my opinion it does not conflict with anything that I have said. I do not think the decision is an authority in support of the plaintiff's case, but if it could be so treated I should desire to consider further whether it can be supported.

In the view I take of this matter the decision of the learned judge was right, and the appeal should be dismissed.

COZENS-HARDY L.J. I am of the same opinion, and I only desire to add one remark. This action was really launched on the lines of the case of *Warlow* v. *Harrison* (2), but in my opinion the attempt to set up an analogy between the two cases fails. The Exchequer Chamber had there to consider a case in which the sale was advertised to be without reserve, and the auctioneer was sued by a man who claimed to be the highest bidder, the only bid overtopping his being that of the vendor. The Court decided that the defendant, the auctioneer, might be liable on the ground that he had contracted that the sale should be without reserve and had broken that contract. Here the contract between the parties is subject to the reserve, and that contract has not been broken, and consequently the plaintiff has no cause of action.

FLETCHER MOULTON L.J. I am of the same opinion. The employment of an auctioneer is as an agent for special purposes, and falls under the general law of agency, by which the employer may restrict the authority given to the agent, subject to certain well-known exceptions not material to this case. The limitation of an auctioneer's authority, by his principal fixing a reserve price, is a perfectly valid and effectual limitation. It is in no wise inconsistent with his employment as an auctioneer, because an auctioneer is as frequently employed to sell subject to a reserve as without one, and indeed in certain markets it may be said to be the more usual practice. A principal, therefore, who gives authority to an auctioneer to sell subject to a reserve price gives no power to the auctioneer, either expressly or impliedly, to

(1) [1904] 2 K. B. 322. (2) 1 E. & E. 309 ; 29 L. J. (Q.B.) 14.

accept a less price. The case of *Rainbow* v. *Howkins* (1), so far as it is inconsistent with this view, cannot be regarded as in harmony with well-established principles. It is admitted in this case that the price offered by the bid of the plaintiff was lower than the reserve price. The auctioneer could not effectively accept such a bid, because he could not make a contract so as to bind his principal to accept less than the reserve price. The claim of the plaintiff, as stated in the pleadings, must therefore fail, because that claim rests on the proposition that it was the duty of the auctioneer to complete a contract to sell the property to the plaintiff for the amount of his bid. I further wish to express my entire agreement with the view expressed by the Master of the Rolls that in a sale by auction with notice that it is subject to a reserve every offer by the auctioneer, and every bid, including the final one, and the acceptance of that final bid indicated by the fall of the hammer, is conditional. The public is informed by the fact that the sale is subject to a reserve that the auctioneer has agreed to sell for the amount which the highest bidder is prepared to give only in case that amount is equal to or higher than the reserve. There was therefore no false representation of authority, and, even if the suggested amendment were made, the action could not be supported.

Appeal dismissed.

Solicitors for plaintiff: *Robinson & Bradley.*
Solicitor for defendant: *T. H. Hiscott.*

(1) [1904] 2 K. B. 322.

A. M.

C. A
1907
March 19.

[IN THE COURT OF APPEAL.]

MOORE *v.* SMEE AND CORNISH.

Landlord and Tenant—Lease—Forfeiture for Non-payment of Rent—Underlessee—"Tenant"—Relief against Forfeiture—Common Law Procedure Act, 1852 (15 *&* 16 *Vict. c.* 76), *s.* 212.

On an application under s. 212 of the Common Law Procedure Act, 1852, for relief against forfeiture of a head lease for non-payment of rent by an underlessee, it is not necessary for the applicant to prove his title as underlessee or assignee of the original lessee; the fact that the applicant is "tenant" in possession is sufficient.

Dictum of Erle J. in *Doe d. Wyatt* v. *Byron*, (1845) 1 C. B. 623, at p. 634, applied.

APPEAL from an order made by Ridley J. at chambers.

The question for decision was the right of a tenant in possession to relief, under the Common Law Procedure Act, 1852, s. 212, against forfeiture of a head lease for non-payment of rent, without having to prove his title as assignee or underlessee of the original lessee or his assigns.

The documents and facts, so far as material for the purpose of this report, were as follows:—

By a lease of October 23, 1868, one John Davies, the freeholder, demised five houses in Grove Terrace, Forest Hill, to Edward Smee for ninety-nine years from September 29, 1868, at a rent of 25*l.* This lease contained the usual proviso for re-entry on non-payment of rent.

By divers mesne assurances, acts in the law and events the property comprised in and demised by this lease became vested in July, 1879, in one B. J. Mills for the residue of the said term. This fact was not known to the defendant Cornish at the time of the commencement of this action.

By an underlease of December 24, 1879, the said B. J. Mills, in consideration of 880*l.*, demised these same five houses to William Reynolds for a term of ninety-nine years from September 29, 1868, less twenty-one days, at the annual rent of 25*l.* William Reynolds was precluded from investigating, and as a fact did not investigate, the title of his lessor when this underlease was granted.

By an indenture of mortgage of the same date William Reynolds assigned these five houses to one Charles Payne for the residue of the said sub-term less the last ten days.

By an indenture of June 25, 1883, made between Charles Payne of the first part, William Reynolds of the second part, and Charles Cornish the elder of the third part, these five houses were assigned and transferred to the said Charles Cornish the elder subject to a proviso for redemption in the usual form. Default was made in payment of the interest due on this mortgage, and in December, 1888, Charles Cornish the elder entered into possession, and continued in possession thereof down to the time of his death in October, 1897, having regularly paid the rent to the plaintiffs or their predecessors in title.

By his will Charles Cornish the elder bequeathed these five houses to his nephew, the defendant Charles Cornish, for all the term and interest to which he should at his death be entitled therein, subject to the payment of the rent reserved by and the covenants and conditions contained in the said indentures of lease under which the same were held.

The defendant Charles Cornish entered into possession, and continued to pay the rent, 25*l.*, to the plaintiffs, as his uncle had done from December, 1888, up to December, 1906, when it was allowed to fall into arrear. Half a year's rent having thus become overdue, the plaintiffs, in whom the freehold reversion was now vested, in February, 1907, commenced the present action against Edward Smee (the original lessee) and Charles Cornish to recover possession of these five houses, on the ground that the term was forfeited by the non-payment of the rent due December 25, 1906. The writ also alleged that the defendant Cornish had attorned tenant to the plaintiffs, and they accordingly claimed 12*l.* 10*s.*, the half-year's rent, and 5*l.* mesne profits.

The defendant Smee was not served with this writ, as his existence and whereabouts were unknown. The defendant Cornish immediately after service of the writ tendered to the plaintiffs the half-year's rent, 12*l.* 10*s.*, and three guineas for costs of the action, but as this was declined he forthwith issued a summons that all further proceedings in the action might be

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stayed under ss. 210 to 212 of the Common Law Procedure Act, 1852, on the ground that he had tendered to the plaintiffs the arrears of rent sued for and the costs of the action, or, alternatively, that he might be granted relief in respect of the forfeiture, if any, mentioned in the indorsement on the writ.

On February 22, 1907, this summons came before the Master in chambers, who declined to grant any relief and dismissed the application; this decision was confirmed by Ridley J. in chambers on March 4. Leave to appeal was, however, given.

The appeal was heard on March 19.

Buckmaster, K.C., and *G. B. Hamilton*, for the appellant. The appellant is the tenant in possession of the premises; he and his uncle have been in possession as mortgagees of the underlease of 1879 ever since December, 1888, and have regularly paid the rent, 25*l.*, to the plaintiffs or their predecessors in title. It is not necessary for the appellant to prove the right or title of B. J. Mills in 1879 to grant this underlease, or to trace the devolution of the head lease from 1868 to 1879; it is sufficient for him that he is the tenant in possession who has paid the rent and admitted the landlord's title.

Sects. 210 to 212 of the Common Law Procedure Act, 1852, are the same as ss. 2, 3 and 4 of 4 Geo. 2, c. 28; the material words are exactly the same, and *Doe d. Wyatt* v. *Byron* (1), decided under the Act of 4 Geo. 2, c. 28, shews that "tenant" in s. 4, which corresponds with s. 212 of the Common Law Procedure Act, 1852, is used in the sense of the person against whom ejectment could be brought, in this case the appellant, who is tenant in possession. This decision is precisely in point. It has been suggested that the Conveyancing Act, 1892, has repealed this provision of the Common Law Procedure Act, 1852, but hat is not so; that the two provisions are wholly independent is clear from *Gray* v. *Bonsall*. (2) It is not incumbent upon a tenant in possession claiming relief against forfeiture for non-payment of rent to prove his title under or through the head lease. It is enough that the applicant should be lawfully

(1) 1 C. B. 623. (2) [1904] 1 K. B. 601.

in possession of the premises, and on shewing this and tendering the rent before judgment he is entitled to relief.

Montague Lush, K.C., and *Lewis Thomas*, for the plaintiffs in the action, the respondents on this appeal. The alleged tenant does not and cannot shew the devolution of the head lease to B. J. Mills; the freeholders do not know that B. J. Mills had any right in December, 1879, to demise these houses to William Reynolds; there is a gap of eleven years between the granting of the head lease and the grant of the underlease, and the appellant fails to shew that he is assignee or underlessee of the original lessee or his assigns, and on this ground he is not entitled to relief. *Doe d. Wyatt* v. *Byron* (1) only shews that an assignee or sub-lessee is in the same position as a lessee, and can get relief, but the appellant has not made out that he is a sub-lessee; he alleges that he is, but he has not shewn any title. Under these circumstances the Master and the learned judge only followed the usual practice in refusing relief.

COZENS-HARDY M.R. I think this order cannot be supported. It is a case of very considerable importance, having regard to the fact that leases for ninety-nine years, or even 999 years in some parts of the kingdom, are very common, and that it is equally common for underleases to be granted which are disposed of in the course of years to persons who do not know, and as the law now stands are not entitled to know, the title under which the underlease is granted or derived.

In this case we have a lease for ninety-nine years: we then have an underlease granted some eleven years afterwards for the residue of that term of ninety-nine years, less twenty-one days, by a person named Mills; and we find that Cornish, the present appellant and defendant, has that underlease, and that he and his predecessors in title have been in possession under such title as is conferred by that underlease for close upon twenty years, during which time a rent of 25*l.* has been paid to the plaintiffs, who are the freehold reversioners. On the rent falling into arrear the plaintiffs issue this writ in ejectment; and they

(1) 1 C. B. 623.

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do it in this form—they sue the original lessee and Cornish, who is, and has been for a long time, in possession. The plaintiffs ask for a declaration that they are entitled to recover possession of the demised property, a declaration that the term has become liable to forfeiture for non-payment of rent, that the term is vested in them, and that Cornish has attorned tenant to the plaintiffs, and they claim possession of the premises and the rent due under the lease and 5*l.* mesne profits.

The answer which the defendant Cornish raised when that writ was served on him was this: he says, I claim the benefit of s. 212 of the Common Law Procedure Act, and before the ejectment action has gone to trial I tender the rent in arrear and I pay the reasonable costs. That being so, s. 212 says the proceedings in ejectment shall cease and be discontinued. There is no answer to that, unless an answer can be found in the fact that Cornish is not a "tenant" within the meaning of that section. That section is, I think, verbally the same as and obviously a re-enactment of a precisely similar section, s. 4 in the old Act, of 4 Geo. 2, c. 28: that Act was brought before the Court of Common Pleas some sixty years ago in *Doe d. Wyatt* v. *Byron* (1), a case which has never since been questioned; and it was there pointed out that the privilege given thereby was not confined to the lessee, his executors, administrators and assigns, strictly so called, but that the word "tenant" must be taken on the context in the Act in a much wider and larger sense. I think the true view is that which is expressed by Erle J. in his judgment in that case where he says (2): "It seems to me that the word 'tenant' in s. 4 is used in the modern sense, meaning the person against whom ejectment is brought." That being so, the whole scheme of legislation seems to me to be perfectly intelligible. This case has nothing to do with the Conveyancing Act, 1892; it has nothing to do with any section except s. 212 of the Common Law Procedure Act. In my opinion the appellant Cornish is entitled to the relief he asks.

BUCKLEY L.J. I am of the same opinion. I think the case is quite clear. To hold that the appellant Cornish has no sufficient

(1) 1 C. B. 623. (2) 1 C. B. at p. 634.

interest in the property to entitle him to relief would be fatal to leasehold titles.

C. A. 1907

MOORE v. SMEE AND CORNISH.

Appeal allowed.

Solicitors: *Loughborough, Gedge & Co.; Burnie & Co.*

W. C. D.

ROBINS *v.* ROBINS.

1907

March 21, 22, 27.

Practice—Husband and Wife—Judicial Separation—Permanent Alimony—Order of Probate and Divorce Division—Arrears—Action to Recover.

No action will lie in the King's Bench Division to recover arrears of permanent alimony payable under an order of the Probate and Divorce Division, such an order not being a final and conclusive judgment upon which an action of debt to enforce it may be maintained.

Bailey v. *Bailey*, (1884) 13 Q. B. D. 855, applied.

TRIAL of action before Joyce J. without a jury.

This was an action to recover the sum of 1121*l.*, being the amount of arrears alleged to be due under an order for alimony and maintenance made in the Divorce Division on June 29, 1888.

The plaintiff Mrs. Robins was the wife of the defendant F. W. Robins, from whom she was judicially separated by the above-mentioned order, made upon her petition. The order provided that the defendant, the respondent in the cause, should out of his then present income, and until further order, pay to the plaintiff, the petitioner in the cause, 250*l.* per annum by way of permanent alimony and maintenance of the children of the marriage. At the date of the order there were four children of the marriage, all of whom were now living, the eldest being about thirty-three years of age and the youngest having attained the age of twenty-one in 1903.

It was admitted that the full amount payable under the order had not been received by the plaintiff, the defendant having from time to time made certain deductions from the annual payments on the ground that the order provided for maintenance of children as well as for alimony, and that as and when the children attained the age of sixteen years the allowance for their maintenance ought to cease. In 1897 the defendant had made

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an unsuccessful application in the Divorce Division to have the order varied.

In his statement of defence the defendant took the following objections to the action—(1.) that no action would lie in the King's Bench Division upon an order of the Divorce Division; (2.) that no action for arrears of alimony would lie at all; and (3.) that if any arrears were recoverable they were limited to one year.

E. Pollock, K.C., and *G. C. Rankin*, for the plaintiff. It is said that the order of 1888 is not a final judgment upon which an action can be maintained, but different considerations apply to arrears which have accrued and are capable of assignment, and have become a liquidated debt capable of being the subject of an action. In *Bailey* v. *Bailey* (1) it was held, no doubt, that no action would lie for arrears of alimony pendente lite payable under an order of the Divorce Division. But this is not an order for alimony pendente lite. Moreover, the ratio decidendi of that case was founded to some extent on the ground that the method of enforcing the orders of the Divorce Court was prescribed by s. 52 of the Divorce Act, 1857 (20 & 21 Vict. c. 85). That section has since been repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), rules of procedure having been made under 20 & 21 Vict. c. 85 which rendered s. 52 unnecessary. *Bailey* v. *Bailey* (1) is therefore no authority in the present case, because the order of 1888 is an order for permanent alimony, and that case is founded on a practice which has been repealed. Actions upon orders are quite common for the purpose of turning them into final judgments upon which to found a bankruptcy notice. In *Norton* v. *Gregory* (2) it was held by the Court of Appeal that an action could be brought in the Queen's Bench Division upon an order of the Divorce Division for the payment of a sum of money for costs. The plaintiff in this case is suing for accrued arrears of permanent alimony, which may be regarded as the ripe fruit of the order. In *Oliver* v. *Lowther* (3) the Court enforced an order of the Divorce Division for alimony by appointing

(1) 13 Q. B. D. 855. (2) (1895) 73 L. T. 10.
(3) (1880) 42 L. T. 47.

a receiver of the defendant's interest under a settlement. Arrears of maintenance are assignable: see per Lindley L.J. in *Watkins* v. *Watkins* (1); and that dictum is equally applicable to arrears of alimony. The plaintiff is entitled to enforce payment of the balance of arrears by this action as one of the remedies which she has in respect of the order of 1888. The Divorce Division refused in 1897 to vary that order, and there is no order releasing the defendant from payment of arrears, nor limiting the plaintiff's rights to one year's arrears or otherwise. It is admitted that the Divorce Division might vary its order, but in the absence of any such variation the arrears stand and are recoverable as a liquidated debt.

Montague Lush, K.C., *W. O. Willis*, and *Stimson*, for the defendant. First, no action will lie on such an order. Secondly, not more than one year's arrears are recoverable; and, at any rate, the right to recover more than six years' arrears is barred by the Statutes of Limitation. Apart from *Bailey* v. *Bailey* (2), which is a clear authority on the point, the action is not maintainable on principle. No action will lie on a judgment which is not final, but remains subject to the control of the Court which pronounced it, and may be varied at its discretion: *Nouvion* v. *Freeman* (3); Bullen and Leake's Precedents of Pleading, 6th ed. p. 212. An action to enforce an order is only maintainable where no remedy is provided by statute, or in cases where the Court will imply a promise to pay. Therefore no action will lie on a judgment of a county court: *Berkeley* v. *Elderkin* (4); nor in general upon a decree of a Court of Equity: Bullen and Leake's Precedents of Pleadings, 3rd ed. p. 193. *Norton* v. *Gregory* (5) does not affect this case. That was in the nature of an action upon a judgment; and *Bailey* v. *Bailey* (2) was distinguished. The Divorce Division always retains control over these orders for alimony, and will sometimes relieve from payment of arrears. Arrears, therefore, are incapable of valuation and not provable in the husband's bankruptcy: *Kerr* v. *Kerr* (6); *Linton* v. *Linton* (7);

(1) [1896] P. 222, 228.
(2) 13 Q. B. D. 855.
(3) (1889) 15 App. Cas. 1.
(4) (1853) 1 E. & B. 805.
(5) 73 L. T. 10.
(6) [1897] 2 Q. B. 439.
(7) (1885) 15 Q. B. D. 239.

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In re Hawkins (1); *Watkins* v. *Watkins*. (2) In the latter case it was held that the Court would not as a rule enforce payment of more than one year's arrears: see also *Wilson* v. *Wilson*. (3) An order for permanent alimony is not assignable: *In re Robinson*. (4) An order for payment of alimony pendente lite is not a "final judgment" within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be issued in respect of arrears under it: *In re Henderson*. (5)

E. Pollock, K.C., in reply. Unless there is something peculiar in the nature of an order for payment of alimony this action will lie: 1 Chitty's Archbold, 14th ed. p. 727. In *Underwood* v. *Underwood* (6) and *Watkins* v. *Watkins* (2) payment of more than one year's arrears was enforced.

Cur. adv. vult.

March 27. JOYCE J. This is an action in the King's Bench Division for the recovery of arrears of alimony under an order made on the granting of a decree of judicial separation. The order provided that the respondent—i.e., the defendant in this action—should, out of his then present income and until further order, pay to the plaintiff, who was the petitioner in that cause, 250*l.* per annum by way of permanent alimony and maintenance of children. Upon an examination of the authorities which were cited at the hearing of this action before me I have come to the conclusion that the material considerations with reference to an interlocutory order for the payment of alimony in a divorce cause pendente lite, which induced the Court of Appeal in *Bailey* v. *Bailey* (7) to determine that an action would not lie on such an order, do not equally apply with reference to the order made upon a judicial separation in the present case, though it was not interlocutory, by the Court of Queen's Bench Division pendente lite. The judgments of the Court in the Queen's Bench Division in *Wilson* v. *Gregory* (8) really support the same conclusion. In *Wilson* v. *Wilson* (9) Lord Herschell said: "It is difficult for the plaintiff in this case to inquire upon what principle the Courts

(1) [1894] 1 Q. B. 25.
(2) [1896] P. 222.
(3) (1830) 3 Hagg. Eccl. 329, n.
(4) (1884) 27 Ch. D. 160.
(5) (1888) 20 Q. B. D. 509.
(6) [1894] P. 204.
(7) 13 Q. B. D. 855.
(8) 73 L. T. 10.
(9) 15 App. Cas. 1, at p. 8.

proceed in giving effect to such a judgment" (in that case it was a foreign judgment) "and in treating it as sufficient to establish the debt. Reliance was placed upon a dictum by Parke B. and Alderson B. in the case of *Williams* v. *Jones* (1), where the law is thus stated, 'Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained.' But it was conceded, and necessarily conceded, by the learned counsel for the appellant, that a judgment, to come within the law as properly laid down, must be a judgment which results from an adjudication of a Court of competent jurisdiction, such judgment being final and conclusive." And a little further down Lord Herschell said: "I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever, established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties." This is not such a judgment. It is not even final and conclusive in the Divorce Court. It was, and still remains, subject to the control of the Divorce Division, which may vary it from time to time, and there is a discretion even as to arrears. It was suggested that a difference might be made by reason of the repeal of s. 52 of the Matrimonial Causes Act, 1857, by s. 1 of the Statute Law Revision Act of 1892. I may say generally that no repeal by a Statute Law Revision Act alters the law in any respect. Moreover, the Act of 1892 itself provides that it shall not affect any principle or rule of law or equity, and I have heard judges of the Court of Appeal say that a Statute Law Revision Act does not alter the law, but simply strikes out certain enactments which have become unnecessary. That being the view which I take of the main point which has been argued before me, it is not necessary for me to deal with the other objections. All I shall do, therefore, is to dismiss the action with costs.

Solicitors: *Swann, Bradley & Co.*; *Wainwright & Co.*

(1) (1845) 13 M. & W. 628.

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[IN THE COURT OF APPEAL.]

HOOTON *v.* DALBY.

March 19, 27.

Practice—Discovery—Interrogatories—Admissibility—Action for Seduction—Disclosure of Names—Rules of Supreme Court, Order XXXI., *r.* 1.

In an action for the seduction of the plaintiff's daughter, where the defendant admitted carnal knowledge but traversed the allegation that he was the father of the daughter's child, an interrogatory whether the defendant alleged that carnal knowledge had taken place between the daughter and any other male person, and, if so, asking for the name and address of such person, is not allowable as tending to call for the names of witnesses whom the defendant may desire to call, or the particular facts on which he means to rely, in support of his defence.

THIS was an action by a father for damages for the alleged seduction of his daughter by the defendant. A child was born on December 6, 1906.

The defendant, in his defence, admitted having had carnal knowledge of the plaintiff's daughter, but not at the critical date, and he denied seduction. Paragraph 3 of his defence was: "The defendant is not the father of the child born to the plaintiff's daughter on December 6, 1906."

The plaintiff had delivered certain interrogatories for the examination of the defendant, to which no exception was taken, but one, which was as follows, had been disallowed by the Master and by Ridley J. in chambers: "Do you allege that carnal knowledge has been had of the said" (daughter) "by any male person or persons other than yourself? If yea, give the name and address of each of such persons respectively."

The defendant declined to say that he would not at the trial give evidence to shew that some other person had had carnal knowledge of the daughter which resulted in the birth of the child, but insisted that he was not bound to answer this interrogatory, and his objection was upheld by Ridley J., who struck it out on March 4.

The plaintiff appealed.

The appeal was heard on March 19.

Norman Craig, for the appellant. It is impossible to try the action fairly unless the plaintiff knows beforehand the nature

of the defence he may have to meet. The traverse by the defendant of the plaintiff's allegations against him is equivalent, under the circumstances, to an allegation by the defendant that somebody else is the father, and the plaintiff has a right to know the name of the person thus alleged to be the father, so that he may be in a position to disprove the allegation. The plaintiff is entitled to interrogate as to the matters intended to be relied on: *Cooper* v. *Blackmore*. (1) The nature of interrogatories in an action for seduction is discussed in *Hodsoll* v. *Taylor* (2), where the plaintiff sought for information of the same character as the present plaintiff now wishes to obtain; the principle is the same in both cases. The nature and scope of interrogatories of this kind is also considered in *Saunders* v. *Jones* (3), which shews that the defendant must specify the facts on which he is going to rely. The right to interrogate is not confined to the facts directly in issue, but extends to facts the existence or non-existence of which is relevant to the existence or non-existence of facts directly in issue: *Marriott* v. *Chamberlain*. (4) Further, a party is entitled to interrogate for the purpose of impeaching or destroying his adversary's case: *Hennessy* v. *Wright*. (5) If the plaintiff is supplied with the name of the person who is alleged by the defendant to be the father of the child he will be able to investigate the truth of the allegation, but this cannot be done without the information required by this interrogatory.

W. Wills, for the defendant. This application is entirely without precedent. No such interrogatory has ever before been allowed in an action for seduction; it is not the same class of interrogatory as was allowed in *Hodsoll* v. *Taylor*. (2) The plaintiff is not entitled to ask the defendant upon what line of facts he is going to rely at the trial or to require the names of his witnesses, for this is what this interrogatory amounts to.

This is a fishing interrogatory, which seeks for information, not in support of the plaintiff's case, but to probe the defendant's case, so as to be the better able to attack it at the trial. The defence is a purely negative plea, throwing the onus upon the

(1) (1886) 2 Times L. R. 746.
(2) (1873) L. R. 9 Q. B. 79.
(3) (1877) 7 Ch. D. 435.
(4) (1886) 17 Q. B. D. 154, at p. 163.
(5) (1888) 24 Q. B. D. 445.

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plaintiff of proving his allegation, and does not amount, as suggested, to an allegation that some one else is the father. What the defendant proposes to prove are facts relevant only by way of disproof of the plaintiff's allegation that the defendant is the father. *Hodsoll* v. *Taylor* (1) is quite different from the present. The interrogatory, therefore, is simply an inquiry as to defendant's evidence, and was rightly disallowed.

Norman Craig replied.

Cur. adv. vult.

March 27. COZENS-HARDY, M.R., after stating the nature of the action and the defence, and having read the interrogatory in question, continued :—The defendant declines to say that he will not at the trial give evidence to shew that some other person had carnal knowledge of the daughter which resulted in the birth of the child, and the plaintiff contends that he cannot be put in a position fairly to try the action unless he knows beforehand what is the nature of the case which he may have to meet. No authority has been called to our attention which justifies such an interrogatory, and upon principle I think it ought not to be allowed. The defendant has simply traversed the allegation that he is the father of the child, and I think this traverse cannot for the present purpose be deemed equivalent to pleading that somebody else is the father, even though the latter proposition is logically involved in the former. If A.'s carriage is damaged by a collision in the street, and B. is sued for damages as having caused the collision, B. may not care to traverse the fact of the collision or the damage done to A.'s carriage, these being facts which could not be controverted, and may simply traverse the allegation that his vehicle was the occasion of the damage. In such a case A. must establish that the vehicle, which ran into his carriage, was B.'s vehicle, and he ought not to be allowed to interrogate B. to say if it was not B.'s vehicle, whose vehicle it was. B. may at the trial prove his traverse by shewing that it was C.'s vehicle which did the damage. This is no part of the plaintiff's case, nor does it tend to disprove the defendant's case. In my view this is really a fishing interrogatory intended to

(1) L. R. 9 Q. B. 79.

ascertain the names of witnesses whom the defendant may desire to call in support of his defence, and, that being so, I think the learned judge was perfectly right in refusing to allow the interrogatory to be delivered. The appeal must be dismissed with costs.

BUCKLEY L.J. The order below has disallowed interrogatory No. 5. The question is whether that is right. The defendant, by his defence, admits that a child has been born, but denies that he is its father. The onus of proving the paternity is on the plaintiff. The plaintiff is entitled to interrogate the defendant as to facts which tend to support the plaintiff's case, or to impeach the defendant's case, but not as to facts which support the defendant's case. The evidence which the defendant will adduce at the trial may be either (*a*) evidence to shew negatively that he is not the father, or (*b*) evidence to shew affirmatively that some one else is. It may be either (*a*) evidence to shew that the plaintiff's facts are not right, or (*b*) evidence of independent facts which if true render the plaintiff's facts impossible. Each of these is simply the defendant's evidence, and the plaintiff is not entitled to interrogate him about them. Lord Esher in *Marriott* v. *Chamberlain* (1) said: "The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue." This is relied on by the plaintiff. It is not, I think, sufficient for his purpose. The interrogatories may, it is true, extend beyond facts directly in issue, but the plaintiff is not entitled to ask the defendant upon what line of facts he is going to rely as relevant to the existence or non-existence of the facts directly in issue. Shortly put, the interrogatory seems to me inadmissible, because it asks the defendant on what line of facts he is going to rely in support of his case.

During the argument it occurred to me whether the matter could be looked upon in the following way. The defence is an admission of the birth of a child and a denial of paternity by the defendant. Is it possible to say that this amounts to an allegation

(1) 17 Q. B. D 154, at p. 163

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Buckley L.J.

that some one other than the defendant was the father, with the result that by way of particulars or interrogatory the plaintiff can inquire who the defendant alleges it is? I think not. The fact that a child has been born (involving as a necessary fact that it had a father) is part of the plaintiff's case, but no part of the defendant's case. The defendant's case is that, child or no child, he is not the father. Facts, therefore, as to who, other than the defendant, was the father of the child are not facts which the defendant has to prove to support his case as distinguished from disproving the plaintiff's case; they are not facts for whose admission any allegation on his part is necessary. They are facts which, if he adduces them, will be relevant only by way of disproof of the plaintiff's allegation of another fact, viz., that the defendant is the father. The interrogatory is therefore simply an inquiry as to what evidence the defendant is going to adduce. I think the interrogatory was rightly disallowed, and that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Lewis & Lewis; Radford & Frankland, for Berryman & Snook, Nottingham.*

W. C. D.

[IN THE COURT OF APPEAL.]

In re VAN LAUN.

Ex parte CHATTERTON.

C. A.
1907
March 15, 16.

Bankruptcy—Solicitor and Client—Cash Accounts—Draft Bills of Costs—Contentious Business—Delivery of detailed Bills waived—Stated and agreed Accounts — Mortgage to secure agreed Balance — Proof by Solicitor — Trustee's Right to go behind Mortgage and settled Account—Right to require Particulars and Vouchers—Judgment recovered—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 22.

No judgment recovered against the bankrupt, no covenant for payment given by or account stated with him, can deprive the trustee in bankruptcy of his right and duty to investigate the nature and grounds of the claim made against the bankrupt's estate: the trustee is therefore entitled to go behind these forms and to require satisfactory evidence that the debt on which the proof is founded is a real debt.

Decision of Bigham J., [1907] 1 K. B. 155, affirmed.

Appeal from Bigham J. (1)

The only question raised on this appeal was as to the right of the trustee in bankruptcy to go behind a mortgage and settled acounts by requiring particulars and vouchers before admitting the proof for the amount claimed. As the mortgage and the facts are set out in detail in the report of the case in the Court below, the following summary is considered sufficient for the purposes of this report:—

Van Laun, the debtor, for some years before his bankruptcy in March, 1906, was engaged in large financial transactions, and employed one Chatterton, a solicitor, to act for him in numerous matters, principally contentious business, and during this period Chatterton collected some 16,000*l.* for the debtor, of which about 13,000*l.* passed through his hands. From March, 1901, to June, 1905, Chatterton furnished the debtor with cash accounts shewing his receipts and payments on behalf of the debtor, and on four occasions these accounts were balanced. On each of these occasions Chatterton produced his draft bill of costs, and the debtor went through it and agreed the amount of it, which sum was debited against him in the cash account, and then

(1) [1907] 1 K. B. 155; by mistake there called *Ex parte Pattullo.*

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the debtor wrote at the foot of the account "I agree this account" and added his signature and the date. On each of these occasions the debtor also requested Chatterton not to deliver to him a detailed bill of costs. January 5, 1905, was the third occasion on which the account was balanced, and it shewed a sum of 3818*l.* 14*s.* 1*d.* due to Chatterton for costs, and on January 10, 1905, the debtor executed a mortgage in favour of Chatterton, whereby, after reciting that the debtor was indebted to Chatterton for costs in respect of business done and professional services rendered by Chatterton, and an account of such indebtedness had been stated and settled and agreed between them at 3818*l.* 14*s.* 1*d.* and that the debtor had requested Chatterton to continue to act for him as his solicitor in various matters, the debtor covenanted to pay Chatterton the 3818*l.* 14*s.* 1*d.* with interest, and also all other sums to become due for business transacted for the debtor by Chatterton, including future costs, and the debtor thereby charged substantially the whole of his property with the payment of all moneys and interest secured by the covenant.

The fourth occasion on which the account was balanced was on August 29, 1905, when the agreed sum due to Chatterton for costs to June 30, 1905, was 6326*l.* 15*s.* 10*d.*

In March, 1906, a receiving order was made against the debtor, adjudication followed, and a trustee was appointed. In April, 1906, Chatterton lodged a proof against the debtor's estate for 7352*l.* 11*s.* 4*d.*, based on the covenant in the mortgage of January 10, 1905. This sum was made up of the 6326*l.* 15*s.* 10*d.* and 225*l.* 15*s.* 6*d.* for interest, and a sum of 800*l.* for professional services rendered from June 30, 1905, to January 4, 1906. Chatterton also claimed that the 6326*l.* 15*s.* 10*d.* was due to him on an account stated. In July the trustee required Chatterton to supply further particulars of his proof, including vouchers for all payments in the stated account from March, 1901, to December, 1904, and details with items of the sums agreed for costs on each of the four occasions when the accounts were balanced as above mentioned. Chatterton refused to furnish these particulars, on the ground that the stated account could not be reopened, and thereupon the trustee rejected the whole of the proof. Against this rejection Chatterton appealed to the judge in

bankruptcy. It was admitted that a bill of costs must be delivered in respect of the 800*l.*, but as to the 6326*l.* 15*s.* 10*d.* it was contended, on behalf of Chatterton, that it was competent for the debtor to waive delivery of bills of costs for the agreed sums in the accounts; that it was now too late for the debtor, more than twelve months having expired since the several sums were settled and agreed, to reopen the stated accounts.

Bigham J. held that, as between the debtor and Chatterton as his solicitor, the carrying of the agreed sums for costs into the cash account and the subsequent statement of the account between them was equivalent to payment of the costs within the meaning of s. 41 of the Solicitors Act, 1843, and that there were no special circumstances which entitled the debtor to require delivery of a detailed bill for taxation; but that, as between the trustee in bankruptcy and the solicitor, the trustee represented the general body of the creditors, and was entitled to go behind the covenant in the mortgage and the stated account, and to require satisfactory evidence before admitting the proof that the claim for costs represented a genuine debt. From this part of the judgment Chatterton appealed.

The appeal was heard on March 15 and 16.

J. A. Hamilton, K.C., and *G. A. Scott*, for the appellant. Where the debtor is sui juris, in the absence of any statutory provision to the contrary, and in the absence of fraud, he may deal with his affairs as he chooses, and the Court will not, at the instance of the trustee in bankruptcy, reopen all the business transactions of the debtor extending over an indefinite period in order to see that they were as favourable to him as they should have been; and in this particular respect a solicitor, who is an officer of the Court and in many respects stands on a different footing from an ordinary creditor, has the same right as any other creditor. No doubt a debtor may induce the Court to go behind a judgment where there is a suggestion of fraud or collusion in order to ascertain whether there was a real consideration for the judgment, but the reason for that is that the judgment is the act of the Court. If the debt had not resulted in a judgment it would stand upon a more firm basis than if

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it had. The principle on which this jurisdiction is exercised is stated by James L.J. in *Ex parte Kibble.* (1)

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Lennox.* (2)]

That case is explained in *In re Flatau* (3), which shews that the Court of Bankruptcy will not go behind a judgment as a matter of course. Except in the case of a judgment, the Court will not reopen what the debtor has honestly agreed to, and there is here no suggestion of fraud or overcharge on the part of the solicitor.

[VAUGHAN WILLIAMS L.J. *Ex parte Knight* (4) shews that the Court may examine the books of the creditor seeking to prove; and see r. 22 of the Second Schedule to the Bankruptcy Act, 1883.]

Unless this doctrine is confined to judgments, there is no logical alternative except to reopen all agreements, of whatever nature and of whatever date.

[COZENS-HARDY M.R. referred to *Scadding* v. *Eyles.* (5)]

Scadding v. *Eyles* (5) is distinguishable.

[BUCKLEY L.J. referred to *Turner* v. *Willis.* (6)]

An action can be brought on an account stated: *Laycock* v. *Pickles.* (7)

[VAUGHAN WILLIAMS L.J. *Turner* v. *Willis* (6) goes no further than *Scadding* v. *Eyles* (5), and in *Brooks* v. *Bockett* (8) a distinction is drawn between an account stated and an account admitted; the amount of the bill of costs cannot be recovered on an account stated: *Eicke* v. *Nokes.* (9)]

A client may dispense with delivery of a signed bill of costs, and when once paid the bill cannot after twelve months be reopened: *In re West, King and Adams.* (10) As soon as there has been "payment" a bill cannot be demanded; the same principle is binding on the trustee in bankruptcy of the client. The trustee cannot stand in any better position than the client.

[VAUGHAN WILLIAMS L.J. referred to *Ex parte Ditton, In re Woods.* (11)]

(1) (1875) L. R. 10 Ch. 373.
(2) (1885) 16 Q. B. D. 315.
(3) (1888) 22 Q. B. D. 83.
(4) (1836) 2 M. & A. 545.
(5) (1846) 9 Q. B. 858.
(6) [1905] 1 K. B. 468.
(7) (1863) 33 L. J. (Q. B.) 43.
(8) (1847) 9 Q. B. 847.
(9) (1834) 1 Moo. & Rob. 359.
(10) [1892] 2 Q. B. 102.
(11) (1880) 13 Ch. D. 318.

The trustee takes the estate as he finds it, and if the debtor before his bankruptcy has done acts which bind his assets, the trustee is bound also. A creditor cannot be required to prove over again in the bankruptcy any claim he has had and arranged with his debtor. Except in the case of judgments the trustee can only go behind the debtor's arrangements with his creditors in cases where the debtor himself could have gone behind them on the ground, say, of fraud or undue advantage; but there is nothing of this kind in this case. If the debtor has not been defrauded or has not acted for an immoral consideration, the debtor and his trustee are equally bound by the debtor's contracts and agreed accounts.

[*In re Allingham* (1) and *Harris* v. *Truman* (2) were also referred to.]

Hansell, for the respondent, the trustee in bankruptcy, was not called upon.

COZENS-HARDY M.R. We need not trouble you, Mr. Hansell. I think that this appeal must fail. There can be no reasonable doubt as to the accuracy of the reasons assigned by Bigham J. for this portion of his judgment; it is very short upon this point, but I do not think it possible to improve upon it, though it is right that I should very briefly state what the facts are.

Mr. Chatterton acted as solicitor for Mr. Van Laun for a considerable period, beginning in 1901 and continuing up to his bankruptcy. Very large sums indeed passed through Mr. Chatterton's hands. There is one item alone of 14,000*l*., and on the other side of the account there are very large payments represented to have been made by Mr. Chatterton to persons who, for the present purpose, I assume to have been creditors of Mr. Van Laun. A solicitor's cash account was prepared, presented, and signed by Mr. Van Laun "as agreed." There are three other accounts of the same kind, but that one account is quite sufficient for the present purpose. Mr. Van Laun gave to his solicitor—or perhaps it is more accurate to say Mr. Chatterton, the solicitor, took from Mr. Van Laun—a mortgage containing a covenant to pay a sum which was then alleged to be due, and

(1) (1886) 32 Ch. D. 36. (2) (1882) 9 Q. B. D. 264.

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shewn to be due, upon the cash accounts and "all future costs." It contains other provisions of a kind which it would be extremely difficult for a solicitor to support as against his client. The deed is a mortgage of property comprised in the schedule, including the greater part of the debtor's assets, consisting of very large claims against the British Government, the Russian Government, directors' fees, and almost everything else. Mr. Van Laun was, according to Mr. Chatterton's statement, furnished with certain draft bills of costs before the 6000*l.* was agreed to; no signed bills of costs, but what are called draft bills of costs, were shewn to him. He seems to have been rather a casual sort of person, and said, "I do not want to see these bills of costs; take them back." I am not giving the actual language of the letter, but in substance it was this, "You may keep them, because they may turn out to be useful hereafter." Bankruptcy intervened, and Mr. Chatterton brings in a proof for 7352*l.* 11*s.* The trustee writes two letters asking in a most reasonable way for particulars, "Tell me how you make out the items of the bills which you charge for costs," one of which had never been delivered, still less paid. Mr. Chatterton refused, and the trustee then rejected the proof on grounds which seem to me to be obviously fair, reasonable and right. "I reject your claim" (he writes) "on the following grounds: That you have failed to furnish me with the further particulars of your claim as required by my letters to you dated respectively the 10th and 26th July, 1906, namely, as regards the sum of 6326*l.* 15*s.* 10*d.* upon an account stated"—that is one item—"by your failure to produce vouchers in support of the various payments alleged to have been made by you between the 16th March, 1901, and 30th June, 1905, and to supply details with dates and items of the following amounts included in the said stated account, namely." Then there are items of four bills of costs which come in round figures to more than 10,000*l.*, I think altogether 11,000*l.* Then it goes on, "And by your failure to furnish me with details with dates and items making up the sum of 800*l.* for fees for work and money expended as a solicitor for the bankrupt." There was an appeal to Bigham J. on the ground that there was a covenant in the mortgage deed, and that the proof was simply

on this covenant; that there was an account stated which would have bound Mr. Van Laun himself, and that apart from the bankruptcy all the bills except the last one had in fact been paid by being settled in the account stated, that more than twelve months had expired; and upon the existing materials it was said there were no special circumstances shewn.

In the view which I take of this case, there are special circumstances which must primarily be had regard to. In the first place, there was the relation between the parties of solicitor and client, which, of course, is one of the most important fiduciary relations known to our law, a relation which renders it exceedingly difficult for Mr. Chatterton to rely upon the mortgage containing the clauses to which I have referred. Next there is this important proposition—that the position of a trustee in bankruptcy, with reference to a person who submits himself to the jurisdiction in bankruptcy and comes in to prove, is not the same as, but in many respects very different from, that of the bankrupt himself.

I cannot regard the requirement of the trustee as being in any way an application by him under the terms of the Solicitors Act requiring delivery and taxation of the bills of costs. That is not at all what the application is. It is simply this—that the trustee says, "You are a person who comes in to prove a debt. It is my duty to see that this bankrupt's assets are distributed amongst those who are justly, legally and properly creditors of the estate. In order to enable me to do my duty, I ask you to furnish me with such information as will enable me to do that which I am told to do by r. 22 in the Second Schedule to the Act, to examine every proof and the grounds of the debt." That is really all that the trustee has done here, and when we are asked to hold and asked to say that there is no authority hitherto for going behind a covenant of this kind, I cannot attach importance to that argument, because it is conceded—and indeed clear by a long series of authorities—that, if a judgment had been obtained upon the covenant, it is competent and it is the duty of the Court of Bankruptcy to go behind the judgment, to open the judgment and to say, "That is the judgment, but the creditor can only prove for the amount which is justly and truly due upon it."

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I do not pause to lay importance upon it, but it is very remarkable that in this case a judgment was obtained by Mr. Chatterton against Mr. Van Laun upon this covenant which was afterwards set aside. If that judgment had not been set aside by Mr. Van Laun, as in fact it has, the greater part of the very able arguments which we have heard from Mr. Hamilton and Mr. Scott would have been quite hopeless. I cannot bring myself to believe that what I may call the judgment cases are anything more than illustrations of the principle that the Court has a right and a duty to investigate the nature and the grounds of the debt.

Now it does not follow in the least by what I have said, and by the order which we propose to make in dismissing the appeal, that Mr. Chatterton will not be entitled hereafter to prove for these amounts. All that we now decide is, that the trustee is entitled to say, "I will not admit your proof until you have given me reasonable means of satisfying myself whether the debt in respect of which you are proving is to any and what extent justifiable and reasonable."

I have not put my propositions in such terse and good language as Bigham J. did, but in effect they are identical with those which he has laid down in the passage which I will now read: "The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him. In the present case the trustee desires to satisfy himself that the claims for costs represent a real indebtedness. He can only do this by seeing and examining the bills. When he sees them it may be that he will think them fair and reasonable and, if so, he will probably admit the proof. But until Mr. Chatterton furnishes him with the means of forming an opinion I think the trustee cannot do otherwise than reject the proof." (1)

(1) [1907] 1 K. B. 155, at p. 162.

I am of opinion that Bigham J. was right, and that this appeal must be dismissed with costs.

VAUGHAN WILLIAMS L.J. I entirely concur, and have nothing to add to what the Master of the Rolls has said, except to say that I think Bigham J. has laid down the law in the clearest and shortest manner possible.

BUCKLEY L.J. In this case the trustee rejected the proof upon the ground that Mr. Chatterton had refused, as was the fact, to supply dates and items of the agreed sums for costs mentioned in the accounts stated. The question is whether that was right or wrong. In my opinion it was right, and right for the reasons given by Bigham J. in the sentence which the Master of the Rolls has just read from his judgment.

It is well settled that the Court can inquire into the consideration for a judgment debt. A courageous argument has been addressed to us that a debt which has not resulted in a judgment stands upon a more firm basis than a debt which has. The mere statement of that proposition occasions surprise. I do not think it is true. Whether the creditor alleges that there has resulted, and that he relies upon an account stated, or a covenant entered into by the debtor, or a judgment which he has obtained, the principle, I apprehend, is exactly the same, and is this—that the trustee is not the person who has stated the account, is not the covenantor, is not the judgment debtor, but is entitled to say, "It is my business to see that those who seek to rank against this estate are persons who are really creditors of that estate." If there be a judgment it is not necessary to shew fraud or collusion. It is sufficient, in the language of Lord Esher, to shew miscarriage of justice—that is to say, that for some good reason there ought not to have been a judgment. Exactly the same, I think, is true of an account stated or of a covenant. I agree with Mr. Hamilton's argument to this extent, that it is true as a general proposition that the trustee takes the estate as he finds it, and if the debtor before the bankruptcy has done acts which bind his assets, the trustee is bound by them. That is a general proposition, but I think that the trustee is entitled, whether there be

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account stated or covenant or judgment, to deal with the matter in the way which I will endeavour to express shortly thus: Suppose there were no account stated, no covenant or no judgment, and that the creditor brought his action for the amount of the debt, the defendant in the action would be entitled to say to him, "Prove your case, vouch your payments, shew me your books, give me such discovery as I, as defendant in the action, am entitled to before you get judgment in the action," and in that sense he is entitled to say, "I do not say that your claim is fraudulent or collusive, but I will say that it rests with you to prove it. Satisfy me that it is right." Of course that results in this, that the man must produce his books or vouch his payments, and must, in short, make out his case. I think the trustee is entitled in every case, whether there be account stated, covenant or judgment, to say to the creditor who comes into the bankruptcy to prove, "Very well, you say you are a creditor; make out your case as if there was no account stated or no covenant or no judgment. Satisfy me that the amount for which you say you are creditor is right." That, of course, must be done reasonably.

The question here is whether the creditor is entitled to say, "I still have my draft bills of costs; I have the means of satisfying you as to my cash account and as to the amount for which I have charged you, but I say you have nothing to do with that, because here is a deed which contains a covenant." It appears to me that is not right. This appeal rests on the state of facts which I have first stated, that the creditor refused to supply dates and items of the agreed sums for costs in the account stated.

In my opinion he was not entitled so to refuse, and when he did so refuse the trustee was entitled to reject his proof. For these reasons I think the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Chatterton & Sons; Spyer & Sons.*

W. C. D.

In re GRANT RICHARDS.
Ex parte WARWICK DEEPING.

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March 18.

Bankruptcy—Author and Publisher—Sale of Copyright to Publisher on Royalties—Bankruptcy of Publisher—Continuing Contract—Trustee carrying on Business—Whether Royalties payable in Full.

An author sold the copyright of his book to a publisher upon the terms that the publisher should print and publish it and should pay him certain royalties upon the sales of the book. The publisher became bankrupt, and the trustee in bankruptcy carried on the bankrupt's business until he sold it as a going concern with all copyrights. During the time the trustee carried on the business sales of the book were effected, and the trustee received the proceeds of these sales. The author claimed to be paid in full the royalties on these sales :—

Held, that the transaction between the author and the publisher was analogous to that of a sale of goods at a price varying in amount and depending on certain events, and that the author was only entitled to prove in the bankruptcy for the damages sustained by breach of the contract.

THIS was an application by an author for the payment in full of the royalties that had accrued on the sales of certain works under these circumstances.

The debtor was a publisher, and on April 23, 1903, he entered into a written agreement with Mr. Warwick Deeping, an author, by which (clause 1) he agreed to purchase the author's entire copyright, without any reserve, in the United Kingdom and all other parts of the world of a work entitled "Uther and Igraine," the completed manuscript of which, executed in a proper manner, the author had delivered to the debtor, and all future editions thereof, in consideration of the payment of certain varying royalties on the sales of the work. By clause 2 the debtor was to print and publish the first and all other editions of the work at his own cost in such manner as he might consider advisable. By clause 3 the debtor had the absolute right to sell, exchange, assign or otherwise dispose of all and every right of publication or of translation of the work on any terms and for any period for the Colonies and foreign countries, and the author was to be paid one-half of the net profits actually received by the debtor. Clause 4 provided that, if the debtor should sell an edition to a publisher or bookseller in the United Kingdom, the author was

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to receive certain other royalties. By clause 12 the debtor was to keep an account of the sales of all copies of the work. Clause 14 negatived any partnership between the parties; and clause 15 provided that the author was to offer the debtor the copyright of all books he might have ready for publication for five years upon certain terms. Under this agreement the debtor, until his bankruptcy, published and sold "Uther and Igraine" and three other works of the author.

On January 17, 1905, a receiving order was made against the debtor, adjudication followed, and on February 3, 1905, a trustee was appointed. The trustee carried on the debtor's business until October 7, 1905, when he sold it as a going concern with all copyrights to one Moring. During the period the trustee was carrying on the business sales of the author's books were made under the agreement of April, 1903, in the United Kingdom and America, and the trustee had received the proceeds of these sales. The author now claimed, as against the trustee, a declaration that under the agreement of 1903 he was entitled to be paid in full the royalties on the sales made by the trustee during the time he was carrying on the business; and an account of all such royalties.

W. O. Hodges, for the author. The trustee did not disclaim the agreement of April, 1903, and cannot take the benefit of it and repudiate the obligations. These royalties are moneys in the hands of the trustee received to the use of the author, or else they constitute a debt due and payable to the author by the trustee arising in and from the carrying on of the debtor's business.

Moresby (*Scrutton, K.C.*, with him), for the trustee. The agreement of April, 1903, does not entitle the author to any preferential payment. It is a mere trading contract, which the trustee continued for the benefit of the bankrupt's estate until he sold the business: *In re Sneezum.* (1) Further, the agreement was an out and out sale of the copyright in exchange for the promise to pay certain sums by way of royalty, and the moneys received from the sales of the books were not impressed with any trust in favour of the author, nor does the promise amount to a

(1) (1876) 3 Ch. D. 463.

promise to pay out of a particular fund when received so as to constitute an equitable assignment: *Re Irving* (1); *William Brandt's Sons, Ld.* v. *Dunlop Rubber Co., Ld.* (2) These royalties, therefore, in the hands of the trustee form part of the general estate of the bankrupt, and the author's remedy is to prove for damages for breach of contract.

W. O. Hodges, in reply.

BIGHAM J. I think this application must be dismissed. Mr. Deeping wrote a book, and he was entitled to the copyright of that book; that was all the property that he possessed. He then desired to sell it, and he sold the copyright to Mr. Grant Richards, who was a publisher, by the agreement of April 23, 1903. The first clause of that agreement is in these words. [The learned judge read the clause, and continued:—] Now by those words I think Mr. Deeping divested himself of the only property he had in the book, namely, the entire copyright. He stipulated for a price to be paid for that which he was selling, just as a man who is selling goods would stipulate for the price to be paid for his goods. The price was to depend upon certain events, and was to vary according to those events. Mr. Grant Richards then became a bankrupt. What is the effect of that? In my opinion the effect is to vest in the trustee that which was vested in the bankrupt, namely, the property in the copyright to do with it what he pleased. The contractual obligation which had been created by the contract forms the basis of a claim against the bankrupt, for which Mr. Deeping can prove against the estate. The amount of the proof may be difficult to ascertain. It must be ascertained with reference to the damages which Mr. Deeping may be said to have sustained by the breach of contract to pay the royalties. For the purposes of this case I regard the transaction as analogous to a sale of goods upon the terms that they are to be paid for according to different scales in different events. Mr. Deeping's claim, therefore, must be limited to a claim for the damages he has sustained by the breach of the agreement.

Solicitors: *Field, Roscoe & Co.; Redfern & Hunt.*

(1) (1877) 7 Ch. D. 419. (2) [1905] A. C. 454.

H. L. F.

1907

March 19.

In re SIMS.
Ex parte THE OFFICIAL RECEIVER.

Bankruptcy — Practice — Moneys improperly retained by Trustee — Penal Interest—Whether payable to Bankrupt's Estate or to the Treasury—The Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 74, *sub-ss.* 3, 6; *s.* 76.

The penal interest of 20 per cent. chargeable against a trustee in bankruptcy under s. 74, sub-s. 6, of the Bankruptcy Act, 1883, for improperly retaining moneys belonging to the estate is payable to the bankrupt's estate, and not to the Treasury.

This was an application which raised the question whether the penal interest charged against a trustee under s. 74, sub-s. 6, of the Bankruptcy Act, 1883, forms part of the bankrupt's estate, or whether it is payable to the Treasury, under these circumstances.

The debtor was adjudicated bankrupt in 1900, and a Mr. Boulton was appointed the trustee. In May, 1903, Boulton was removed from his office of trustee by the Board of Trade for failing to keep up his guarantee bond, and the official receiver became the trustee. Shortly afterwards it transpired that Boulton had in June, 1901, received 320*l.* belonging to the estate for which he had not accounted. This sum, however, he paid into the Bank of England in July, 1903. Subsequently the Board of Trade, in exercise of the powers given them by s. 74, sub-s. 6, of the Act, required him to pay 20 per cent. interest on the 320*l.* he had improperly retained for the period during which it had remained unaccounted for. This penal interest amounted to 109*l.* 18*s.* 5*d.*, and was still unpaid. Meanwhile Boulton had submitted his accounts, which shewed a balance due to him of 90*l.* 6*s.* 11*d.* for disbursement made by him on account of the estate.

The question then arose whether the 109*l.* 18*s.* 5*d.* was payable to the bankrupt's estate, in which case Boulton would be entitled to set off the 90*l.* 6*s.* 11*d.*, or whether it was payable to the Treasury, in which case there would be no set-off, and the money would be applied in aid of the fund out of which the expenses of bankruptcy administration are met. The opinion of

Mr. Muir Mackenzie (counsel to the Board of Trade) was taken on the point, and he advised that this penal interest belonged to the bankrupt's estate. In view, however, of the long-established practice of paying this penal interest to the Treasury, counsel was asked to reconsider the matter, but he adhered to his previous opinion. (1) The official receiver, as trustee, now applied for a

(1) Mr. Muir Mackenzie's further opinion was as follows:—"I have reconsidered this question. It will, I think, be found that the origin of the liability of assignees in bankruptcy to pay penal interest on money retained by them was founded on decisions of the Lords Chancellors given before 1826, which laid down that if an assignee retained money in his hands he should be ordered to pay interest upon it, on the ground that he must be presumed to have improperly made a profit out of the money which he had retained. The rate charged was generally 5 per cent. This is shewn by the cases of *Treves* v. *Townshend* ((1784) 1 Bro. C. C. 384), *In re Hilliard* ((1790) 1 Ves. 89), and *Fletcher* v. *Dodd* ((1789) 1 Ves. 85).

"It was not until the 49 Geo. 3, c. 121, that the liability to pay this interest was imposed by statute. By s. 4 of that Act the Commissioners were required to 'charge' assignees with interest at the rate of 20*l.* per cent. for all sums retained by the assignees. This enactment was repeated in the 6 Geo. 4, c. 16, s. 104. Under the former enactment it was held in *Beresford* v. *Birch* ((1824) 1 C. & P. 373) that the interest was in the nature of a penalty, and must be recovered on a special count framed on the provisions of the Act, but this penalty was held to be so recoverable by the Commissioners for the benefit of the estate. The judge in that case pointed out that, notwithstanding the words of the section, it was not a case of merely charging interest in accounts. So, also, in *Ex parte Goldsmith* ((1824) 1 Gl. & J. 405) the 20 per cent. interest was treated as a sum recoverable by the Commissioners in the nature of a penalty; and in *Ex parte Benham* ((1835) 1 Deac. 26) it was held that it was only the culpable retainer of money by an assignee that made him liable to pay the 20 per cent. interest to the estate. The Act of 1849 used the same word 'charge' as the Acts of George III. and George IV. It is clear, therefore, that under those Acts, notwithstanding the words used, the 20 per cent. interest was directly recoverable by the Commissioners by action in the form of a claim for a special sum in the nature of a penalty recoverable for the estate. In s. 30 of the Act of 1869 the words creating the trustee's liability are that he shall 'pay' interest at the rate of 20 per cent. per annum on the amount retained in excess of 50*l.*; and words to the same effect are used in s. 74 of the Act of 1883.

"Having regard to the statutes and decisions, I feel unable to draw a distinction between the effect of the earlier enactments and the effect of the enactments in the Acts of 1869 and 1883; nor do I think that the provisions of s. 76 of the Act of 1883 as to the investment of balances affect the question. I cannot see how it could have been successfully argued that under the enactment in

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declaration that Boulton was liable to pay to the estate the 109*l.* 18*s.* 5*d.*; that the 90*l.* 11*s.* 6*d.* might be applied in part satisfaction of the 109*l.* 18*s.* 5*d.*; and that Boulton might be ordered to pay the balance of 19*l.* 6*s.* 11*d.* to the official receiver. The Treasury did not desire to be made parties to the application.

E. W. Hansell, for the official receiver. By s. 74, sub-s. 1, of the Bankruptcy Act, 1883, a trustee has to pay all moneys he receives into the bankruptcy estates account at the Bank of England; but sub-s. 4 provides that under certain circumstances he may have an account at a local bank in the name of the debtor's estate, and that any interest receivable in respect of that account shall be part of the assets of the estate; and sub-s. 6 enacts that, if a trustee at any time retains for more than ten days a sum exceeding 50*l.*, he shall pay interest on the amount so retained in excess at the rate of 20*l.* per cent. per annum. Then s. 76 provides that the cash balance standing to the credit of the bankruptcy estates account in excess of the amount required to answer demands in respect of the bankrupt's estate shall be paid over to the Treasury. Under these provisions it has been the invariable practice for the last nineteen years to pay this penal interest to the Treasury, but it is submitted that Mr. Muir Mackenzie's opinion is sound, and that it is payable to the bankrupt's estate for the benefit of the creditors.

The respondent Boulton did not appear.

BIGHAM J. I think, for the reasons given in Mr. Muir Mackenzie's opinion, that the order asked for should be made. I think so, also, on the wording of s. 74 of the Bankruptcy Act, 1883. Sub-s. 6 of that section provides that, if a trustee retains for more than ten days a sum of 50*l.*, he shall pay interest on

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the Act of 1869 the interest would have been recoverable by the Treasury, and there is no difference between the enactment in the Act of 1869 and the enactment in the Act of 1883.

"My opinion is, therefore, that under s. 74 of the Act of 1883 the 20 per cent. interest for which a trustee is made liable is recoverable for the benefit of the estate, and that the Treasury is not entitled to such interest; and that the procedure for recovering the interest is by motion in the bankruptcy, or by action, and not by information or any process for recovering penalties by the Crown.'

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the amount so retained in excess at the rate of 20 per cent. per annum; and Mr. Boulton, the trustee in this case, by retaining the sums of money in excess of 50*l.* for more than ten days, came within the operation of that sub-section, and therefore became liable to pay the 20 per cent. The reason why that penal rate, or penal sum, is imposed on the trustee is that it may be reasonably presumed he has been using the money of the estate, for his own purposes and making a profit out of it. If he has, then that profit is money which he receives to the use of the estate, and, that being so, it comes within the meaning of sub-s. 3 of s. 74, which says that a trustee shall pay any money that he receives to the bankruptcy estates account. That, in my opinion, is sufficient to shew that this penal interest is money which the trustee owes to the estate, and which he ought to pay into the bankruptcy estates account. Therefore I make the order asked for.

Solicitor: *The Solicitor to the Board of Trade.*

H. L. F.

BROMLEY RURAL DISTRICT COUNCIL *v.* CROYDON CORPORATION.

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Jan. 14, 15, 17, 18; *Feb.* 8.

Highway—Extraordinary Traffic—Repair of Highway—Recovery of Expenses—Limitation of Time for bringing Action—Locomotives Act, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*b*).

The defendants, a municipal corporation, entered into two similar contracts for the haulage by contractors respectively of flints and ragstone for the period between March 31, 1904, and March 31, 1905. The plaintiffs, as the authority liable to repair highways in the district, incurred extraordinary expenses in repairing a highway in consequence of damage done to the highway between March 31, 1904, and March 31, 1905, by extraordinary traffic conducted over the highway in the haulage of the flints and ragstone. The flints and ragstone were required by the defendants from time to time for their general purposes, there being some evidence to shew that they were used mainly for the construction of new streets. The last load under the contracts was carried on March 31, 1905, and the action was commenced on August 22, 1905, the claim being in respect of the damage done to the highway between March 31, 1904, and March 31, 1905:—

Held, that the work done under each of the two contracts ought to be

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treated as similar to work done under a "building contract," and as "work extending over a long period," within the meaning of s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898; and that, inasmuch as the action had been commenced within six months after the completion of the work, the plaintiffs were entitled to recover the amount of the extraordinary expenses incurred by them by reason of the damage done from March 31, 1904, to March 31, 1905, in the execution of the contracts.

ACTION tried before Walton J. without a jury.

The action was brought by the plaintiffs, the Bromley Rural District Council, against the defendants to recover the sum of 698*l.* 15*s.* 5*d.*, the amount of extraordinary expenses alleged to have been incurred by the plaintiffs in repairing highways by reason of excessive weight passing along the same and extraordinary traffic thereon.

The plaintiffs were the authority liable to repair the highways in the Bromley district, and by their statement of claim alleged that they had suffered damage by reason that they had incurred extraordinary expenses in repairing a highway from Farnborough to West Wickham, in the county of Kent and the Bromley district, by reason of the damage caused by excessive weight passing along the same and extraordinary traffic thereon, such weight or traffic having been conducted by, or in consequence of, the order of the defendants.

By their defence the defendants relied on (inter alia) the Locomotives Act, 1898, s. 12, sub-s. 1 (*b*). (1)

The highway in question was that part of the road from Farnborough to Croydon (about three miles five furlongs in length), which was within the district of the Bromley Rural District Council. The traffic upon the road which was said to have constituted extraordinary traffic was the haulage of certain flints and ragstone for the defendant corporation. The flints and ragstone were hauled by two contractors, Messrs. Chittenden &

(1) Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12, sub-s. 1 (*b*): "Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work."

Simmons and Messrs. Thomas Wood & Sons. Each of the contractors did the work under contracts with the defendants. The period during which damage was alleged to have been done by the extraordinary traffic in respect of which the claim was made was the period between March 31, 1904, and March 31, 1905. Each contractor entered into a contract to deliver flints to the defendants during the twelve months from March 31, 1904, to March 31, 1905, in such quantities and numbers, at such times and in such manner, as the defendants, or any person duly authorized by them, should from time to time by order in writing direct.

The work was continued practically all the year round. The hauling took place in every month from March, 1904, to March, 1905, except that for some reason or another there was nothing done in October; but in every other month during those twelve months some of the haulage took place—in other words, the flints were required by the defendants, not just for one piece of work, but from time to time for their general purposes. There was some evidence to shew that they were used mainly for the construction of new streets.

The work under the contracts was finished in March, 1905, the last load being carried on March 31, 1905. The writ in this action was issued on August 22, 1905, the claim being in respect of damage done between March, 1904, and March, 1905.

Walton J. found that the traffic during the period from March 31, 1904, to March 31, 1905, was extraordinary traffic, and that the amount of damage done by that traffic amounted to 350*l.*

Macmorran, K.C. (*Hansell* with him), for the plaintiffs. This was work extending over a long period within the meaning of s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898. The plaintiffs are therefore entitled to recover the whole amount of the damage done to the highway between March 31, 1904, and March 31, 1905, the action having been commenced within six months of the completion of the work.

Dickens, K.C., and *Hohler, K.C.* (*Colam* with them), for the defendants. The work was not "particular . . . . work extending

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over a long period" within the meaning of s. 12, sub-s. 1 (*b*), of the Act of 1898. Therefore the plaintiffs can only recover under that section the expenses incurred in consequence of the damage which was done within the period of twelve months before the commencement of the action, i.e., the damage done between August 22, 1904, and the date of the completion of the work, viz., March 31, 1905.

Cur. adv. vult.

Feb. 8. WALTON J., after stating the facts, continued:—There remains a question which is to some extent a question of law, because it depends on the construction of the Locomotives Act, 1898, s. 12, sub-s. 1 (*b*). The writ was issued within six months of the completion of the work under the contracts, as it was issued in August, 1905, the contract work having been finished on March 31 of that year. If the present case is within the latter part of s. 12, sub-s. 1 (*b*), of the Act of 1898—that is to say, if the damage was the consequence of something in the nature of a particular building contract or work extending over a long period within the meaning of that sub-section—then the plaintiffs would be entitled to recover the total amount of expenses incurred in repairing the damage done, i.e., 350*l*., because the writ was issued within six months of the date when the work was completed. On the other hand, if the work was not work done under a particular building contract, or work extending over a long period within the meaning of s. 12, sub-s. 1 (*b*), of the Act of 1898, the action would, under the first part of the sub-section, have to be commenced within twelve months of the time at which the damage was done, and therefore the plaintiffs could recover only in respect of damage done between August 22, 1904, and March 31, 1905, and not for the whole period, in respect of which the claim is made. I have, therefore, to consider whether the damage was in consequence of any particular building contract, or work extending over a long period within the meaning of s. 12, sub-s. 1 (*b*), of the Act of 1898. I am not aware of any decision in any reported case laying down a rule which plainly applies to the present case. No doubt the latter part of s. 12, sub-s. 1 (*b*), of the Act of 1898 ordinarily applies to work such as

the construction of a new building or to some other defined work which plainly has a beginning and an end, e.g., a defined widening of a road, or the building of a reservoir. In the present case the work was rather different from that; it was the work of carting flints for the use of the Croydon Corporation. The flints were not required for the purposes of some single piece of work which had a definite beginning and ending, and therefore there seems to me to be some difficulty in holding that work of that kind is within the latter part of s. 12, sub-s. 1 (*b*), of the Act of 1898 as work done under a particular building contract or extending over a long period. The words of the sub-section are not particularly clear; they are descriptive, and how far the description goes is a little difficult to define. For instance, if this work had been done by the defendants themselves with their own traction engine and waggons, I should have thought that the latter part of s. 12, sub-s. 1 (*b*), of the Act of 1898 would not apply, and that the limitation would be the twelve months prescribed by the earlier part of the sub-section. However, there is no doubt that in the present case the work was done under definite contracts and over a definite period—a period of twelve months. Although I do not think there is any established rule which necessarily applies to the present case, yet I think the decisions in two cases have a bearing upon the question, viz., *Epsom Urban District Council* v. *London County Council* (1) and *Kent County Council* v. *Folkestone Corporation.* (2) It appears to me that those decisions involve the proposition that work causing damage to a road by extraordinary traffic which is done under a particular contract extending over a definite and considerable length of time is within the latter part of s. 12, sub-s. 1 (*b*), of the Act of 1898. In *Epsom Urban District Council* v. *London County Council*(1) there was a question as to two contracts, and Bigham J. held that as to one contract the action was in time, but as to the other the action was brought too late. There were two contracts for part performance of what may be described as one work, but Bigham J. appears to have treated the work done under each contract as constituting one work for the purposes of s. 12, sub-s. 1 (*b*), of the Act of 1898 and I think that in *Kent County Council* v.

(1) [1900] 2 Q. B. 751. (2) [1905] 1 K. B. 620.

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Folkestone Corporation (1) it was also assumed—it was scarcely discussed—that work done under a contract was one work within the meaning of the sub-section. I am not sure that the present case is not distinguishable in some respects, but I desire to follow the view of Bigham J. and of the Court of Appeal. I wish, as far as possible, to interpret this section in the same way as they appear to me to have done; and, as far as I can judge from carefully reading the reports of those two cases, they lead to this conclusion, that the work done under each of the two contracts in the present case (viz., the contracts for the year March, 1904, to March, 1905) should be treated as similar to work done under a building contract and as work extending over a long period within the meaning of s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898.

I am therefore of opinion that the plaintiffs are entitled to recover the whole sum of 350*l*. In arriving at this conclusion I am following the interpretation which appears to me to have been put upon this section in *Epsom Urban District Council* v. *London County Council* (2) and *Kent County Council* v. *Folkestone Corporation*. (1)

Judgment for plaintiffs.

Solicitors for plaintiffs: *May, Sykes & Co.*

Solicitors for defendants: *Smith, Rundell & Dods, for F. C. Lloyd, Croydon.*

(1) [1905] 1 K. B. 620.

(2) [1900] 2 Q. B. 751.

J. E. A.

LONDON COUNTY COUNCIL *v.* HANCOCK & JAMES.

1907
March 25.

London—Buildings—"Structure"—Erection beyond general Line of Buildings—Show-case of Wood and Glass—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 22; *s.* 200, *sub-s.* 3 (*a*)—*London Building Act*, 1894 (*Amendment*) *Act*, 1898 (61 & 62 *Vict. c. cxxxvii.*), *s.* 7.

The respondents carried on business at premises the front main wall of which stood back about seven feet from the public way. The front door of the premises was in the front main wall, and was approached from the public footway by a flight of four stone steps and a stone landing at the top of the steps. The respondents, without the consent of the London County Council, erected upon the steps and landing a show-case of wood and glass, the length of which was 7 ft. 6 in., the width 1 ft. 10 in., and the height above the street level 9 ft. 3 in. The show-case stood upon the respondents' property, and took the place of a shop front, which projected 6 ft. 3 in. beyond the general line of buildings. The houses in the street in which the respondents' premises were situated had bay windows in front of the general line of buildings, and the show-case was slightly in front of the bays:—

Held, that the show-case was not a "structure" within the meaning of s. 22 of the London Building Act, 1894, and that the respondents, by erecting it without the consent of the council, had not acted in contravention of that section.

Case stated by a metropolitan magistrate.

On June 28, 1906, the respondents appeared to answer an information laid by Thomas Chilvers, on behalf of the appellants the London County Council, which charged the respondents with having unlawfully erected a structure, in contravention of the provisions of Part III. of the London Building Act, 1894, beyond the general line of buildings of Grafton Street, without the consent in writing of the London County Council, whereby the respondents became liable to the penalty prescribed by s. 200, sub-s. 3, of the Act of 1894 as amended by the London Building Act (Amendment) Act, 1898. At the hearing of the information the following facts were proved or admitted: (*a*) The respondents carry on business as court milliners at No. 8, Grafton Street, W. The front main wall of No. 8 stands back about seven feet from the public way. The front door is in the front main wall, and is approached from the public footway by a flight of four stone steps and a stone landing at the top of the steps. (*b*) At the time laid

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in the information the respondents, without the consent of the London County Council, erected upon the steps and landing above referred to a large show-case of wood and glass, having the following dimensions: Length, 7 ft. 6 in.; width, 1 ft. 10 in.; height above the street level, 9 ft. 3 in. The show-case, according to the evidence, took the place of a shop front. (*c*) The general line of buildings in Grafton Street in which the premises are situate was duly determined by a certificate of the superintending architect, dated June 11, 1906, and the show-case projects 6 ft. 3 in. beyond the general line of buildings. (*d*) The show-case stands upon the respondents' property. The houses in this part of Grafton Street have bay windows in front of the general line of buildings, and the show-case is slightly in front of the bays.

The magistrate was of opinion, on the authority of *London County Council* v. *Illuminated Advertisements Co.* (1), that, so far as it was a question of fact for him to decide, the show-case did not amount to the erection of a structure within the meaning of s. 22 of the London Building Act, 1894, and he accordingly dismissed the information. The question for the opinion of the Court was whether upon the facts above stated the respondents erected a structure in contravention of s. 22 of the London Building Act, 1894. (2)

(1) [1904] 2 K. B. 886.

(2) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 22, sub-s. 1: "No building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street or part of a street place or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet notwithstanding there being gardens or vacant spaces between the line of buildings and the highway. Such general line of buildings shall if required be defined by the superintending architect by a certificate such certificate to be issued within one month from the date of the application therefor." By s. 200, sub-s. 3 (*a*), of the Act of 1894 (as amended by s. 7 of the London Building Act, 1894 (Amendment) Act, 1898 (61 & 62 Vict. c. cxxxvii.)), every person who erects or brings forward any building or structure in contravention of any of the provisions of Part III. of the Act of 1894 (which includes s. 22) is made liable to certain penalties, and in addition to have an order made against him directing him to demolish such building or structure or any part thereof.

Avory, K.C. (*Daldy* with him), for the appellants. The show-case is a "structure" within the meaning of s. 22 of the London Building Act, 1894. It is, in fact, a shop front. *London County Council* v. *Illuminated Advertisements Co.* (1) is distinguishable. The show-case is part of the building itself. It took the place of the shop front. Even if it is not part of the building, it is a structure. In order to be a structure a thing need not be part of the actual building: *Coburg Hotel* v. *London County Council.* (2) If the erection of this show-case does not require the consent of the appellants, the owner of any shop in Bond Street can extend similar things in the nature of a building over the pavement. The show-case, being in the nature of a building, is a structure within the meaning of s. 22 of the Act of 1894, although not part of the building. It is different from an advertisement hung out from a building. It is not necessary, in order that s. 22 of the London Building Act, 1894, should be applicable, that there should be any obstruction. The section may become applicable where a mere question of æstheticism is involved. A structure as distinguished from a building is a "structure" within the meaning of the section. A show-case, being in the nature of a shop front, is the very kind of "structure" intended to be dealt with by the section. [*Leicester Corporation* v. *Brown* (3), *Richardson* v. *Brown* (4), *London County Council* v. *Schewzik* (5), and *London County Council* v. *Culley and Gill* (6) were also referred to.]

Ernest Todd, for the respondents, was not heard.

LORD ALVERSTONE C.J. This case brings out in relief the extreme importance of following, as far as possible, previous decisions in this Court. Nothing could be worse than attempting in this Court to draw fine distinctions with the object of avoiding the effect of decisions which, if they are to be reconsidered, must be reviewed in the Court of Appeal. There is no statement in the special case that the show-case was, as a structure, a shop front; and it was not in the position of a shop front. It is stated in the case that it took the place of a shop front, by which is meant

(1) [1904] 2 K. B. 886.
(2) (1899) 81 L. T. 450.
(3) (1892) 62 L. J. (M.C.) 22.
(4) (1885) 49 J. P. 661.
(5) [1905] 2 K. B. 695.
(6) (1900) Not reported.

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Lord Alverstone C.J.

that articles which would ordinarily be displayed in a shop front, such as blouses, ties, cuffs or collars, could be placed in it. I am unable to add anything to what I said in *London County Council* v. *Illuminated Advertisements Co.* (1) In my opinion the London Building Act, 1894, is a building statute, and for the reasons which I endeavoured to explain in *London County Council* v. *Illuminated Advertisements Co.* (1), which I do not wish to enlarge upon, s. 22 of the Act of 1894 was not in my opinion intended to apply to a construction which is in the nature of a show-case, whether fastened to a building or not. If it were not for the decision in *Hull* v. *London County Council* (2), which is binding upon us, I should have said that if fastened to a building it might be a projection.

In my judgment the magistrate was perfectly right, and we could not reverse his decision consistently with the judgments of the majority of the Court in *London County Council* v. *Illuminated Advertisements Co.* (1) It is important to point out that the summons in the present case was taken out under s. 22 of the London Building Act, 1894, and not for a breach of s. 73, sub-s. 8, which deals with projections from buildings. I am of opinion that the magistrate was right in coming to the conclusion, as a matter of fact, that the show-case was not a structure. The appeal must be dismissed.

DARLING J. I am of the same opinion. If it had not been for the decision in *London County Council* v. *Illuminated Advertisements Co.* (1) I should have felt bound to say that in my opinion this was a structure. But in that case my Lord and Kennedy J. held that the magistrate, having come to a conclusion upon a matter of fact in circumstances very like these, this Court was not in a position to interfere and to say that a thing was by law a structure which he had decided as a matter of fact was not one. If it had not been that the decision of the majority of the Court in that case is binding upon me, I should have followed the judgment given by Wills J.; but, as the judgment of the majority of the Court is binding, I do not feel at liberty to act upon the judgment of Wills J., although

(1) [1904] 2 K. B 886. (2) [1901] 1 K. B. 580.

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my inclination is to think that his is the right view. However, in this particular instance I am very glad to be bound by the decision in *London County Council* v. *Illuminated Advertisements Co.* (1), because I look upon this as a most frivolous prosecution. The London Building Act, 1894, was passed to prevent the erection of buildings or structures in streets beyond the general line of buildings. In Grafton Street, where this show-case is, there are a number of small bay windows which project close to the pavement. The surveyor who fixed the general line of buildings might perfectly well have said that the general line of buildings was the front of those bay windows, and if that had been done the show-case would not have projected beyond the general line of buildings, because it does not project beyond the front of the bay windows. But he did not say that. He fixed the back of the bay windows as the general line of buildings. The show-case is in no sense a projection. No one can say that any harm is done except that it is in front, not of the bay windows, which are the real line, but of the theoretical or ideal general line of buildings as fixed by the surveyor.

I am therefore glad to have authority which enables me to say that the show-case is not a structure within the London Building Act, 1894.

A. T. LAWRENCE J. I am of the same opinion. I am unable to say that the magistrate was wrong in law when he found as a fact that this was not a structure having regard to the decision in *London County Council* v. *Illuminated Advertisements Co.* (1)

Appeal dismissed without costs. (2)

Solicitor for appellants: *Seager Berry.*

Solicitors for respondents: *Hilder, Thompson & Dunn.*

(1) [1904] 2 K. B. 886.

(2) On March 26 *Ernest Todd*, for the respondents, made an application that the respondents be allowed their costs. He said that the ground upon which he made the application was that the case had come into the list without the respondents' knowledge, the Crown Office authorities having stated that the Crown paper would not be taken in the Hilary Sittings. He had in consequence been absent at the hearing on March 25. The Court granted the application.

J. E. A.

BIBL. LONDIN. UNIV.

Considered. PEARSON v. ROSE & YOUNG LD. [1951] 1 K. B. 275

[IN THE COURT OF APPEAL.]

C. A.

1907

March 21, 22, 25.

OPPENHEIMER *v.* FRAZER & WYATT AND ANOTHER.

Factor—Mercantile Agent—Possession of Goods—Consent of Owner—Larceny by a Trick—Person taking in Good Faith under Disposition by Mercantile Agent—Purchase on Joint Account—Bad Faith on part of One of Two Joint Purchasers—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *s.* 2, *sub-s.* 1.

Where a mercantile agent, who is in possession of goods with the consent of the owner, makes, without the authority and in fraud of the owner, a sale of them to joint purchasers, who act as partners in the particular transaction of the purchase of them as a speculation, and one of the joint purchasers does not act in good faith, the other joint purchasers, although they personally act in good faith, are not within the protection given by the Factors Act, 1889, s. 2, sub-s. 1.

Semble, where the circumstances under which a mercantile agent has obtained possession of goods from their owner are such as to render him guilty of larceny by a trick, he cannot be said to be in possession of the goods with the consent of the owner within the meaning of the above-mentioned section.

Decision of Channell J., [1907] 1 K. B. 519, in part reversed.

APPLICATIONS, by the plaintiff and one of the defendants respectively, for judgment or a new trial as after mentioned, in an action tried by Channell J. with a jury. (1)

The action was brought against a firm called Frazer & Wyatt and one Broadhurst for the recovery of certain parcels of diamonds, or damages for their conversion.

The defendants in their defence relied upon the provisions of the Factors Act, 1889, s. 2, sub-s. 1.

The facts, as appearing from the evidence, so far as material to the points of law in respect of which the case is reported, may be stated as follows :—

The plaintiff, who was a diamond merchant, parted with the possession of a number of parcels of diamonds belonging to him to one Schwabacher, a diamond broker, under the following circumstances. Schwabacher came to the plaintiff in the month of April, 1906, and represented that he knew certain firms carrying on business in the diamond trade, named respectively Pinto Leite & Nephews and Edward Kellers, who were likely to be customers for the plaintiff's diamonds. The plaintiff stated in

(1) See [1907] 1 K. B. 519.

evidence that, in consequence of that representation, on that occasion and on subsequent occasions before the end of October, 1906, he handed parcels of diamonds, to the aggregate value of between 30,000*l.* and 40,000*l.*, to Schwabacher to deal with, instructing him to offer them only to the firms so mentioned at certain prices. It appeared from the evidence that it is the usual course of business in the diamond trade that, when diamonds are entrusted to a diamond broker for sale on commission, a price is given him, and, if he can get that price, then he delivers the parcel to the purchaser and completes the sale; but if he cannot get that price, but can get an offer of a lower price which he considers reasonable, he can do what is called "take a seal," that is, place the diamonds in an envelope, which is sealed by the prospective buyer, with the price offered by him written upon it. The offer is then submitted to the owner of the diamonds, and if he accepts it the business is concluded, but if he does not the seal is broken, the object of this practice being that, while the negotiations are pending, the seller shall not be able to try to get a better price from another buyer elsewhere. Schwabacher from time to time reported to the plaintiff sales of diamonds as being made to the above-mentioned firms at the prices asked by the plaintiff; and in many cases he brought back to the plaintiff "seals," i.e., parcels of diamonds sealed up as before mentioned in envelopes, with lower prices written upon them, which purported to be offered by one or other of the firms; and, those prices being accepted by the plaintiff, the diamonds were left in Schwabacher's possession for the purpose of being delivered in pursuance of the supposed bargain. This had occurred in respect of some of the diamonds which were the subject of the action. Schwabacher from time to time rendered accounts to the plaintiff of the supposed sales, and made large payments to him in respect of the prices of the diamonds. It was discovered, however, subsequently that he had never in fact sold any of the diamonds to either of the above-mentioned firms, and towards the close of the year he quitted this country, leaving a large portion of the value of the diamonds delivered to him as aforesaid unaccounted for to the plaintiff. It appeared that he had pledged some of the diamonds, and some he had

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handed to the defendant Broadhurst, who was a diamond broker, and with whom he had had previous dealings, for the purpose of his endeavouring to sell them on his (Schwabacher's) account. The action was brought in respect of five parcels of diamonds delivered under the above-mentioned circumstances by the plaintiff to Schwabacher on certain dates in September and October, 1906, and never offered by him to Pinto Leite & Nephews or Edward Kellers, but handed to Broadhurst for sale as aforesaid. These parcels had been dealt with by Broadhurst on various occasions in substantially the same manner, which was as follows. He took the diamonds to the defendants Frazer & Wyatt, who were diamond merchants, and, after explaining that he brought them from Schwabacher, who wanted to sell them for cash, and that he, Broadhurst, could afford to take half of them, but not the whole, himself, asked Frazer & Wyatt to purchase them from Schwabacher on joint account with himself. Frazer & Wyatt agreed to do this, and paid the agreed prices of the diamonds, which were considerably lower than those at which Schwabacher was authorised to sell them by the plaintiff, by their cheques in favour of Schwabacher, taking invoices of the diamonds from him to themselves. They subsequently debited Broadhurst in their books with half of the purchase price of the diamonds, and, when they were ultimately sold by them at a profit, they credited him with half of that profit. It will be seen from the judgments that the Court of Appeal were of opinion, on the evidence as to these transactions, that the defendants Frazer & Wyatt and the defendant Broadhurst acted as partners or co-adventurers in the particular speculation of purchasing the diamonds. The jury found in answer to questions left to them by the learned judge that Schwabacher, in obtaining the diamonds from the plaintiff, had been guilty of larceny by a trick, and that the defendants Frazer & Wyatt had acted in good faith in the matter, but that the defendant Broadhurst had not so acted. Channell J., upon further consideration, gave judgment for the defendants Frazer & Wyatt against the plaintiff, and judgment for the plaintiff for the value of the diamonds against the defendant Broadhurst. (1)

(1) See [1907] 1 K. B. 519.

The plaintiff applied for judgment or a new trial as against the defendants Frazer & Wyatt; and the defendant Broadhurst applied for judgment or a new trial, on the ground that there was no evidence to support the finding of the jury that he had not acted in good faith, and that the finding was against the weight of evidence. (1)

Sir R. B. Finlay, K.C., and *Rawlinson, K.C.* (*H. Dobb* and *E. Dunkels* with them), for the plaintiff, in support of his application. In order that the Factors Act, 1889, s. 2, sub-s. 1, may apply, the goods must have been in the possession of the mercantile agent as such with the consent of the owner. [The finding of the jury that Schwabacher obtained possession of the diamonds by larceny by a trick is inconsistent with consent by the plaintiff to the possession of them by him.] In the previous Factors Acts, which were superseded by the Factors Act, 1889, the expression used was "agent entrusted with the possession of goods." There is no reason to think that the alteration of phraseology in the present Act was intended to alter the law in this respect. Therefore, [in order that the Act may apply, there must have been an entrusting or bailment of the goods by their owner to a mercantile agent as such in the course of his business. The finding of the jury in this case negatives the inference that there was any such entrusting or bailment of the goods to Schwabacher as a mercantile agent; for it shews that he never received them as such an agent, but received them under such circumstances that in law he must be regarded as having taken them without the consent of the owner, as a thief.] The fallacy underlying the judgment of Channell J. is that he ignores the fact that the consent of two minds is essential to a contract of

(1) The evidence was very lengthy, and the details of the transactions involved were very complicated, but it is thought that the outline of the facts given above will be sufficient for the purposes of the points of law in respect of which the case is reported. Facts bearing upon the question whether the findings of the jury ought to stand or there should be a new trial, and the course which things took at the trial, so far as material to that question, may be gathered sufficiently from the judgments. The arguments and judgments, so far as they merely relate to that question, are not given at length, inasmuch as the matters involved were rather matters of fact than of law.

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bailment. The finding of the jury shews that Schwabacher did not intend to receive the diamonds as a bailee, but to steal them. The Act cannot apply to a case where in law there was no bailment to the mercantile agent, but a theft by him: see *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.*(1); *Cole* v. *North Western Bank* (2); *Hardman* v. *Booth* (3); Pollock and Wright on Possession in the Common Law, pp. 218, 219.

Secondly, the finding of the jury that the defendant Broadhurst did not act in good faith is fatal to the defence of the defendants Frazer & Wyatt under the Factors Act. It prevents them from saying that the persons taking under the disposition made by Schwabacher acted in good faith. The defendants Frazer & Wyatt and the defendant Broadhurst were joint purchasers and partners for that particular venture. It cannot be argued in a case where partners take under a disposition made by a mercantile agent that the disposition may be good under the Factors Act, 1889, as to one of such partners who has acted in good faith, but give no title to another partner who has not so acted. It is impossible so to split up the transaction. [They cited on this point *Reid* v. *Hollinshead.* (4)]

J. A. Hamilton, K.C., and *Norman Craig*, for the defendants Frazer & Wyatt. For the purpose of the application of the Factors Act, 1889, s. 2, sub-s. 1, regard must be had, not to the relations between the plaintiff and Schwabacher quoad the title to the diamonds, nor to the question whether Schwabacher was guilty of stealing them as between himself and the plaintiff, but to the position of a person taking in good faith under a disposition made by a mercantile agent of goods which were in fact in his possession with the consent of the owner. It is immaterial as regards the position of the person so taking that the possession of the goods was obtained by the mercantile agent under such circumstances as for the purposes of the criminal law would prevent him from being heard to say that it was obtained by consent of the owner. The Factors Act, 1889, s. 2, sub-s. 1, does not require that the goods should be intrusted to the mercantile agent by the owner, but merely that they

(1) [1899] 1 Q. B. 643.
(2) (1875) L. R. 10 C. P. 354.
(3) (1863) 1 H. & C. 803.
(4) (1825) 4 B. & C. 867.

should be in the agent's possession with his consent. Here the goods undoubtedly were in point of fact in possession of Schwabacher with the consent of the plaintiff. The doctrine of larceny by a trick really involves a legal fiction, for by virtue of it goods which were in truth delivered by their owner to the person accused are held in law to have been "taken" by the latter against the owner's will. That fiction, which really was brought into existence for the purposes of the criminal law, in relation to which it works justice, ought not to be invoked in dealing with questions under the Factors Act in relation to which it would work injustice. The Factors Act, 1889, s. 2, sub-s. 1, is a remedial measure, which was intended to alter the common law in the interest of innocent persons taking under a disposition of goods made by a mercantile agent in possession of them with the consent of the owner, and whether there was such consent in point of fact is the material question for the purposes of that sub-section, not whether a consent given in fact was one which amounted to consent in point of criminal law. For the purposes of the Factors Act, 1889, the question is what was in the mind of the owner of the goods, not what was in the mind of the mercantile agent, when possession of them was obtained from the former by the latter. Transactions of the greatest magnitude are constantly taking place by way of dispositions by mercantile agents, and the effect and object of the successive Factors Acts have been progressively to safeguard the position of innocent purchasers and pledgees in such cases. If the application of the Act is made dependent on the intention which existed in the mind of the mercantile agent when he received the goods, i.e., on his intention then being to steal them or to become a bailee of them, the protection given by the Act will be largely nullified. The observations of Collins L.J. in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1), upon which the plaintiff has relied, were mere obiter dicta, and were not necessary for the decision of the case. He only meant by them to reserve the point now raised.

It is clear that the fact that Schwabacher obtained possession of the diamonds by false pretences, or that he was subsequently

(1) [1899] 1 Q. B. 643, at p. 659.

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guilty of larceny of them as a bailee, would not prevent the defendants Frazer & Wyatt from being protected by the Factors Act, 1889.

[The counsel for the defendants Frazer & Wyatt then proceeded to contend that the evidence in the case would not support a finding that Schwabacher had been guilty of larceny by a trick when he obtained possession of the diamonds, and therefore such a finding could not stand; and also that, having regard to what had taken place at the trial, it was doubtful whether the finding of the jury ought to be interpreted as meaning that he had been guilty of such a larceny; and that, therefore, there ought to be a new trial, if the case had to be determined on that point. The question was raised whether these contentions were open to them, there having been no cross notice of application for a new trial given by them, and as to this Order LVIII., r. 6, was cited. The Court were of opinion that under the circumstances the case ought to be dealt with as if such a notice, if requisite, had been given.]

[The essential distinction between the offence of larceny by a trick and that of obtaining goods by false pretences is that in the one case the possession only of the goods is intended by the owner to be parted with, whereas in the other case the intention is to part with the property in them:] see *Reg.* v. *Buckmaster* (1); Archbold's Criminal Pleading and Practice, 23rd ed. pp. 447, 449, and cases there collected. Here the plaintiff intended to do more than merely part with the possession of the diamonds. He parted with their possession to Schwabacher, and also gave him power to transfer the property in them by effecting a sale to the firms indicated by him. Schwabacher, having obtained the diamonds by a false representation, may have been guilty of obtaining goods by false pretences, but he could not be guilty of larceny by a trick. [They also cited on this part of the case *Fuentes* v. *Montis* (2); *Sheppard* v. *Union Bank of London* (3); *Kingsford* v. *Merry* (4); *Baines* v. *Swainson.* (5)]

With regard to the second point taken for the plaintiff, the

(1) (1887) 20 Q. B. D. 182.
(2) (1868) L. R. 3 C. P. 268; 4 C. P. 93.
(3) (1862) 7 H. & N. 661.
(4) (1856) 1 H. & N. 503.
(5) (1863) 4 B. & S. 270

evidence does not shew that the defendants Frazer & Wyatt were joint purchasers or partners with the defendant Broadhurst in the transaction of the purchase from Schwabacher. They were intended to be, and were, the purchasers from Schwabacher; but, by independent arrangement between them and the defendant Broadhurst, he was to be treated by them as beneficially interested in the profits made by them on resale of the diamonds to the extent of one-half. The way in which the transaction was carried out in their books was merely the business mode of arriving at the amount of the profit due to him. The expression "on joint account" as used in business does not involve that in point of law the parties are joint purchasers or partners in the transaction of the purchase. There were none of the incidents of partnership as between the defendants Frazer & Wyatt and the defendant Broadhurst even quoad the particular transaction. The whole control of the matter rested with Frazer & Wyatt. They did not act as agents for Broadhurst in effecting the purchase, and he found no capital. All that happened was that Frazer & Wyatt, instead of paying anything in the nature of commission to him, gave him a share of the net profit made by them on sale of the diamonds. It was held in *Meyer* v. *Sharpe* (1) that an agent who is paid by a proportion of the profits of an adventure in goods is not, therefore, a partner in the goods.

Sir R. B. Finlay, K.C., for the plaintiff, in reply. [He was stopped on the question as to the effect of the finding of the jury that Schwabacher, in obtaining possession of the diamonds, had been guilty of larceny by a trick, the learned President stating that the Court were of opinion that, if that finding stood, the judgment in favour of the defendants Frazer & Wyatt could not be supported. He therefore only addressed his observations to other points.]

Colam and *Moresby*, for the defendant Broadhurst, in support of his application, contended, first, that there was no evidence to support the finding of the jury that the defendant Broadhurst had not acted in good faith, and that the finding was against the weight of the evidence; and, secondly, that, on the facts as proved,

(1) (1813) 5 Taunt. 74.

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there was no evidence to support the finding that Schwabacher had, in obtaining possession of the diamonds, been guilty of larceny by a trick. On this latter point they cited 2 Russell on Crimes, 6th ed., book 3, c. 10, s. 4, p. 141; *Rex* v. *Harvey* (1); *Rex* v. *Adams* (2); *Rex* v. *Nicholson* (3); *Rex* v. *Parkes*. (4)

Rawlinson, K.C., for the plaintiff, on the defendant Broadhurst's application.

Colam, in reply.

Cur. adv. vult.

March 25. SIR GORELL BARNES, PRESIDENT. In this case there are two applications, one of which is made by the plaintiff by way of appeal from the judgment of Channell J. after the trial of the action before him with a jury, asking for judgment against the defendants Frazer & Wyatt or a new trial. There is no cross-notice of application by the defendants Frazer & Wyatt questioning the findings of the jury. It was contended that no such notice was necessary under the rules, but, however that may be, I think that, under the circumstances, the case ought to be treated as though such a notice, if requisite, had been given. The other application is by the defendant Broadhurst, against whom judgment was given after the trial, asking for judgment or a new trial.

The facts, shortly stated, are as follows. The action was brought by the plaintiff to recover from the defendants five parcels of diamonds, or damages for their conversion. By way of defence the defendants relied on the provisions of the Factors Act, 1889, s. 2, sub-s. 1. The plaintiff, who is a diamond merchant, handed the parcels of diamonds which are the subject of the action, as well as others, to one Schwabacher, a diamond broker, who had stated that he had certain prospective customers for them, naming two firms engaged in the diamond trade. It appeared that Schwabacher never offered the diamonds to either of those firms, but handed them to the defendant Broadhurst, for the purpose of his endeavouring to find purchasers for them. He took them to the defendants Frazer & Wyatt, who were

(1) (1787) 1 Leach, 467.
(2) (1812) R. & R. 225.
(3) (1794) 2 Leach, 610.
(4) (1794) 2 Leach, 614.

diamond merchants, and, stating to them that Schwabacher was desirous of selling the diamonds, asked them if they would buy them on joint account with himself. Frazer & Wyatt agreed to do this, and paid the price of the diamonds by their cheques in favour of Schwabacher, he rendering invoices to them. They then debited Broadhurst in their books with half of the purchase-money, and credited him with half of the profits, when the diamonds were sold by them. The foregoing is a sufficient outline of the facts to enable the findings of the jury to be appreciated. Those findings were that Schwabacher obtained the diamonds by larceny by a trick, and that Frazer & Wyatt acted in good faith in the purchase of them, but that Broadhurst did not act in good faith. After an argument on further consideration the learned judge gave judgment for the plaintiff against Broadhurst for the value of the diamonds, and judgment for Frazer & Wyatt against the plaintiff.

To appreciate the points that have been argued before us it is necessary to refer shortly to the evidence as to what took place between the various parties to the transactions in relation to these diamonds. [The learned President then proceeded to read portions of the evidence, the substantial effect of which it has been sought to summarize in the statement of facts at the commencement of this report, and then proceeded as follows :—]

Now it is clear upon that evidence that at common law the defendants would be liable in the action, because they received the plaintiff's diamonds through the unauthorized action of Schwabacher; but by virtue of the Factors Act, 1889, s. 2, sub-s. 1, the defendants might, nevertheless, have a title to the diamonds if they could bring themselves within its provisions. That sub-section enacts that, "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has

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not at the time of the disposition notice that the person making the disposition has not authority to make the same."

It has not been disputed before us that Schwabacher was a mercantile agent, and that, in disposing of the diamonds as he did to the defendants, he was acting in the ordinary course of business of such an agent. It is clear also that Schwabacher was in fact in possession of the diamonds, and that possession of them had been given to him by the plaintiff.

As to that Channell J. said in summing up: "He must be in possession of the goods with the consent of the owner. If that takes place, provided he acts in the ordinary course of business, and the person taking under the disposition acts in good faith, then the owner is bound, notwithstanding that he has not authorized the sale or particular disposition. What one has to see, therefore, first is whether these goods, the diamonds which were in the possession of Simon Schwabacher, were in his possession with the consent of the owner, that is, Mr. Oppenheimer. Now that there was the consent in fact, there is no doubt. They were handed over for a particular purpose, for being sold, or being offered in the first instance for sale, and in all these cases they were supposed to have been sold, to one or other of two firms who have been named. The consent in fact is beyond all possible doubt." I refer to these words because I think they have a bearing on the way in which Channell J. interpreted the finding of the jury in this case. He proceeded to say: "Now the law is perfectly clear that, if there is consent in fact, the operation of this Act is not destroyed by proving that the consent was obtained by fraud. In the present case (and I will go into what the circumstances were directly) I think there is no reasonable doubt that Mr. Oppenheimer consented to this large transaction, which had been going on for some months by the same person dealing with the particular firms. I should think there is no doubt the consent was in fact obtained by fraud, but that does not prevent the Act operating, and that is perfectly clear from the decided cases. But what is not quite clear is whether, if it was not only obtained by fraud, but obtained under circumstances which amount to larceny, that is stealing, if it was obtained under circumstances which amount to stealing then and

there, the Act would not apply." Then the learned judge discussed some cases which illustrate what he had been saying. There is therefore no doubt that Schwabacher was a mercantile agent, that he dealt with the goods in the ordinary course of business of such an agent, and that he was in fact in possession of the goods, which possession had been given to him by the plaintiff.

It is contended, however, for the plaintiff, first, that, having regard to the finding of the jury that Schwabacher obtained possession of the diamonds by larceny by a trick, there was no consent by the plaintiff to the possession of the diamonds by him within the meaning of the Factors Act, 1889, s. 2, sub-s. 1; and, secondly, that, the defendant Broadhurst having been found by the jury not to have acted in good faith, the defendants Frazer & Wyatt, although they were found to have acted in good faith, were, under the circumstances, affected by the fact that Broadhurst, who was jointly interested with them in the purchase of the diamonds, acted in bad faith. The defendant Broadhurst attacks the finding of the jury on this point, contending that there was no evidence to support it, and that it was against the weight of the evidence.

I think that it will be desirable to deal with this latter point first, because in my view, if the conclusion be arrived at that the finding of the jury that Broadhurst did not act in good faith must stand, that will dispose of the case. I say so, because, notwithstanding the argument of the counsel for the defendants Frazer & Wyatt, in my opinion the finding of the jury as against the defendant Broadhurst, if it stands, also affects them.

Channell J., in giving judgment on further consideration, said, in effect, that he did not think that the transaction was that, after Frazer & Wyatt bought the goods, they agreed to give Broadhurst a half-share, but that it was intended from the first that he should have a half-share; and that he thought that the true legal inference was that Frazer & Wyatt bought and acquired the property in the diamonds as to half as beneficiaries, and as to the other half in trust for Broadhurst; and, that being so, they got a good legal and beneficial title as to one half, but that the title as to the other half-share was not good, the result

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being that Frazer & Wyatt could not be said to have converted the plaintiff's diamonds. I confess that I have not been able to follow that conclusion of the learned judge. It seems to me clear upon the evidence that the result of what took place was that the defendants Frazer & Wyatt and the defendant Broadhurst were partners in the particular transactions, and that as such partners they were the "persons taking under the disposition" made by Schwabacher within the meaning of s. 2, sub-s. 1, of the Factors Act, 1889. That being so, it follows, in my opinion, from the finding of the jury as against Broadhurst, that the defendants Frazer & Wyatt cannot bring themselves within that subsection, because they cannot shew that the persons taking under the disposition acted in good faith. As partners in the joint transactions with Broadhurst, I think they must stand or fall with him, and want of good faith on his part must affect them also, although personally they have acted in good faith. The finding of the jury that Broadhurst did not act in good faith appears to me necessarily to defeat the right of the defendants Frazer & Wyatt to assert that they were protected, as having taken the goods in good faith, under s. 2 of the Factors Act, 1889.

It follows that the next point to consider is whether the finding of the jury that Broadhurst did not act in good faith ought to stand. With regard to that question, I think it is clear that the burden of proving that he acted in good faith lies upon the person who seeks to bring himself within the Factors Act, 1889, s. 2. It seems obvious that, as he would have no title at common law, that must be so. If there was any evidence to support the finding of the jury, the question of good faith is eminently one of fact for them to determine. [The learned President then proceeded to discuss the evidence upon the question whether the defendant Broadhurst acted in good faith, and continued as follows:—] In the result I come to the conclusion that there was evidence to support the finding of the jury that the defendant Broadhurst did not act in good faith, and I cannot say, under the circumstances, that their finding was so unreasonable as to be against the weight of the evidence. The application of the defendant Broadhurst must therefore be dismissed, and the finding of the jury must stand.

That being so, it follows from what I have before said that it is really unnecessary to consider the other question as to the effect of the finding of the jury that Schwabacher obtained possession of the diamonds by larceny by a trick, but probably it would under the circumstances be better for me to say how that matter strikes me.

There is no doubt that, in order that the provisions of the Factors Act, 1889, s. 2, sub-s. 1, may apply, the goods must be in the possession of the mercantile agent with the consent of the owner. If the finding of the jury must be read as the plaintiff seeks to read it—and having regard to the direction given by Channell J. to the jury, it is difficult, I think, to read it otherwise—I confess to feeling very great doubt whether, in the face of that finding, Schwabacher can be considered to have been in possession of the goods with the plaintiff's consent. At the close of the case the learned judge left the matter to the jury in this way: "With regard to the other question, the question about larceny by a trick, that is for the plaintiff to satisfy you. If he satisfies you that the possession of these goods was not merely obtained by the fraud of Schwabacher, but that that fraud went to the length of a concocted trick, so that he could be convicted of stealing them there and then—you follow what the difference is—if the plaintiff is right, he could be convicted of stealing them when he was walking away from the place, and before he had taken them to Frazer & Wyatt. That is the difference between stealing them then and there, and stealing at a later stage when he sold them to Frazer & Wyatt. If he had been caught by a policeman when he was going out of the office, then it would have been said that he was stealing them then because of this misrepresentation about Pinto Leite and the other firm. That is what you have to find in order to find that there was larceny by a trick. I leave you that question." Pausing there, I must say that I doubt whether the jury from that direction could have adequately appreciated the difference that there is between the actual delivery of goods and that which amounts to a transfer of the property in them. However, the foreman of the jury, interposing later on, said: "The larceny must be there from the first. I mean to say, supposing he started in

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good faith, and then half-way through, or at the end of September or October, began to decide that he would convert them to his own use, is not that larceny by a trick?" The learned judge replied: "The question is whether these particular parcels of diamonds were stolen by larceny by a trick." Then the wording of the finding is, "We agree that Schwabacher obtained the goods by larceny by a trick." Now the plaintiff says that that finding negatives consent. The defendants on the other hand say that there may have been consent for the purposes of the Factors Act, even though there was larceny. I confess that, if it were necessary to decide the case on this point, I should feel great difficulty upon the terms of the finding, following as it did the statement of the question contained in the concluding words of the learned judge, in interpreting that finding in any other way than as a finding that these parcels of diamonds were stolen by ordinary common law larceny. If the finding must be so interpreted, then I see very great difficulty in saying that there could be consent on the plaintiff's part, because, by the well-known definition of larceny, it consists in feloniously "taking" the goods of another without his consent, and against his will, with intent to convert them to the use of the taker. If the finding is to be read in that way, and it had been necessary to decide the case on this point, I should myself have thought, having regard to the facts of this case, that it was necessary that there should be a new trial on the point. I am inclined to doubt whether Channell J. thought that the finding must be read strictly in the way in which I have read it, and possibly, having regard to the undisputed facts of the case, he may be right in the view which I think he must have taken of the verdict. At the close of the evidence a discussion appears to have taken place as to the questions which were to be left to the jury. The plaintiff's counsel suggested that the question, which ought to be put, was whether Schwabacher obtained the goods in question, or any of them, from the plaintiff under circumstances which amounted to the offence of larceny by a trick, to which suggestion the judge objected that this would be asking them a question of law. The defendants' counsel then said that the proper question was whether Schwabacher was in possession of

the diamonds with the consent of the plaintiff; and then the plaintiff's counsel suggested various specific questions of fact as being questions which should be left to the jury. I am certainly disposed to think that, if it were necessary to dispose of the case on this point, it would have been the safer course to ascertain the facts by putting specific questions of fact to the jury. But, ultimately, the suggestion of putting such questions of fact to the jury on this point appears to have been dropped, and the question was left to the jury in the way that I have already stated. In the course of his summing up the learned judge had said, besides what I have already referred to: "Then do you think this was from beginning to end a trick of the description I put to you, a trick to get hold of the goods for the fraudulent purpose of applying them to his own purposes? If you think that, you will tell us so, and we will deal with it. My view is that, being a bailee, he committed the offence of larceny as a bailee, having got the goods into his possession, and then stolen them, or misappropriated them by pledging or underselling them to the other people contrary to his authority. I am sorry to have to trouble you with that, but I think it is better to do so." After the finding, he said, "Of course there is the point behind whether there is any proper evidence of that. It is so difficult to explain to the jury. I differ altogether from that in point of fact as well as in the law." When the case came before him on further consideration, after reviewing the cases which were cited to him, he said: "It seems to me that the true rule is that, where there is a consent of the owner of the goods to the possession of the goods by the mercantile agent as a mercantile agent—and that is the important part of the matter—that then the statute applies, provided the other conditions are fulfilled; but there may be such a trick as would prevent there being any consent of the owner to the particular man having them as a mercantile agent. The facts in *Kingsford* v. *Merry* (1) and *Hardman* v. *Booth* (2), if they applied, might do so; but here there is nothing but a fraud, and a fraud of exactly the same character as took place in *Baines* v. *Swainson*. (3)

(1) 1 H. & N. 503. (2) 1 H. & C. 803.
(3) 4 B. & S. 270.

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There the man represented to one firm that he was acting for another firm who proposed to buy the goods, whereas that firm had given him no authority, and had been in no communication with him, exactly as was the case here." And, after having made these observations, he said later on: "I think, therefore, that this finding of the jury that Schwabacher obtained the diamonds by means of larceny by a trick was an immaterial finding."

I do not myself see how the finding of the jury could be said to be immaterial, if it meant that the goods were stolen. I think the learned judge's meaning must have been that his view was that, on the undisputed facts, the offence committed by Schwabacher was either obtaining goods by false pretences or larceny by a bailee, because the diamonds were, undoubtedly, originally placed in his hands by the plaintiff, who himself said that he from time to time let Schwabacher have the parcels of diamonds to deal with; and I cannot help thinking that the judge, in saying that the finding of the jury was "immaterial," must have thought that, there being in fact consent as the plaintiff stated, the offence committed was, as I have said, either larceny by a bailee or obtaining goods by false pretences, and that possibly, therefore, he might read the finding of the jury in that sense. If it cannot be read in that way, and if the case had to be decided on this point, I should say that it would be necessary that there should be a new trial.

I do not think that it is necessary, under the circumstances, to enter into a long investigation as to the effect of the various decisions with regard to the exact meaning of larceny by a trick. They appear to be somewhat conflicting. Some of them date from times when larceny was a capital offence, and there was therefore probably a tendency to the conclusion that the facts did not amount to larceny; and others are cases which were decided when that was no longer so, and there was not the same reason for seeking to avoid a conviction for larceny, and in which therefore, in order to prevent a criminal from escaping punishment, he was possibly held guilty of larceny on facts as to which there might be some doubt whether they really amounted to that offence. I do not propose, therefore, to discuss

the cases which have been cited on this subject. As I have said, if it were necessary to decide the case on this point, I think it would be desirable that specific questions of fact should be left to a jury, and that the matter should then be dealt with upon their answers to such questions. I suspect from what took place at the trial that the jury in this case may very probably not have clearly appreciated the distinction between the different kinds of criminal offences which might be charged in connection with such a case, or the effect of the distinction between parting with the possession of goods and parting with the property in them in relation to the question at issue. But it is not necessary to decide the case on this question, the point with which I first dealt being sufficient to determine it. The result is that the judgment in favour of the defendants Frazer & Wyatt cannot stand; the application of the plaintiff for judgment against them must be allowed, and the application of the defendant Broadhurst must be dismissed.

FLETCHER MOULTON L.J. Upon the facts of this case it is clear that at common law the defendants would have no defence to the action. The defence set up is that they are entitled to the protection given by s. 2, sub-s. 1, of the Factors Act, 1889, which, under certain circumstances, protects a person who in good faith has taken goods under a disposition of them made by a mercantile agent in possession of those goods with the consent of the owner. In my opinion the defence breaks down upon two points—first, because the goods in question were not, according to one of the findings of the jury, in the possession of the mercantile agent with the consent of the owner; and, secondly, because, according to the other findings of the jury, the persons taking under the disposition did not act in good faith. For convenience I will take the second of these points first, inasmuch as the President has done so.

Sect. 2, sub-s. 1, of the Factors Act, 1889, gives protection only where "the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same." In applying that provision to the circumstances of the

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present case, the first question which arises is, Who is the person taking under the disposition here? It appears to me to be incontestable that the persons so taking were the co-adventurers, Frazer & Wyatt and Broadhurst, who purchased these diamonds from Schwabacher on a joint venture, in which Frazer & Wyatt took a half-share and Broadhurst took the other half-share. For the purposes of these particular purchases they were as much partners as Frazer & Wyatt were partners for the purposes of their ordinary business. Where two persons so purchase as joint purchasers, it cannot, in my opinion, be said that the persons taking under the disposition act in good faith within the meaning of the Factors Act, 1889, if either of them acts in bad faith, and notice to either of them, at the time of the disposition, that the person making it has not authority to make the same is notice to both. That proposition appears to me to be so clear that I shall not dwell upon it any further.

The only question, as regards this part of the case, which appears to me to require examination is whether the verdict to the effect that the defendant Broadhurst did not act in good faith was such as the jury were upon the evidence entitled to find. It is not for this Court to say whether they were right or wrong in the conclusion at which they arrived. The question is whether there was evidence for them, and, if so, whether we can say that their finding was perverse or unreasonable. [The learned Lord Justice then proceeded to discuss this question, and arrived at the conclusion that there was evidence to support the finding of the jury in this respect, and that it could not be set aside as being against the weight of the evidence.]

That being so, it follows that the judgment in favour of the defendants Frazer & Wyatt cannot stand for the reasons which I have given, and judgment must be given against them, and the application of the defendant Broadhurst for a new trial must be dismissed.

As the question of law involved is an important one, I feel bound to deal with the other ground upon which I think the defence based upon the Factors Act, 1889, s. 2, sub-s. 1, fails. The question turns upon the words in the earlier part of the section, "where a mercantile agent is, with the consent of the

owner, in possession of goods." Was Schwabacher in possession of these diamonds with the consent of the owner? We have the advantage of having had this important point dealt with in the considered judgment of the Court of Appeal in *Cahn* v. *Pockett's Bristol Channel Steam Packet Co.* (1) I cannot express my view as to the intention of the Legislature in enacting s. 2 of the Factors Act, 1889, more clearly than by reading a passage from the judgment delivered by Collins L.J., as he then was, in that case. He said (2): "The Factors Act, 1889, which is thus referred to, and as to part of it in terms again enacted, in the Sale of Goods Act, is the last of a series of statutes whereby the Legislature has gradually enlarged the powers of persons in the actual possession of goods or documents of title, but without property therein, to pass the property in the goods to bona fide purchasers. Possession of, not property in, the thing disposed of is the cardinal fact. From the point of view of the bona fide purchaser the ostensible authority based on the fact of possession is the same whether there is property in the thing, or authority to deal with it in the person in possession at the time of the disposition or not. But the Legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods, or documents, or otherwise got possession of them without the consent of the owner."

That seems to me to be a most judicial appreciation of the Factors Act, 1889, s. 2. The Legislature has given a very wide, but not an absolute, protection to those who purchase from a person in the position of a mercantile agent in the ordinary course of business. I confess I do not feel much affected by the arguments of counsel dwelling upon the necessity of giving a wide interpretation to the provisions of the Factors Act, 1889, because the operations by way of selling or pledging goods effected by persons in the position of a mercantile agent are of such magnitude and importance. I do not think that a Court, in construing an enactment of this kind, has any right to lean in either direction. It is for the Legislature to decide how far the

(1) [1899] 1 Q. B. 643. (2) [1899] 1 Q. B. 658.

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protection to be given in such cases shall extend. What its decision in that respect has been must be gathered from the language of the enactment, and we have only loyally to administer that decision. The Legislature has stopped short of giving protection in cases where the goods are in possession of the mercantile agent without the consent of their owner. In *Cahn* v. *Pockett's Bristol Steam Packet Co.* (1) this Court had to consider the meaning of this provision, and its decision may be summed up, as it appears to me, in a single phrase, namely, that "consent" for the purposes of the section must be what amounts to consent in the eye of the law. Anything that negatives the existence of consent in the eye of the law appears to me to negative its existence for the purposes of s. 2 of the Factors Act, 1889. I do not see how it is possible to come to any other conclusion than that "consent" in the section means what the law recognizes as consent. Collins L.J. proceeds in the passage from which I have quoted to say: "But, if a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent—see *Baines* v. *Swainson* (2); *Sheppard* v. *Union Bank of London* (3)—he is able to pass a good title to a bona fide purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser. See the distinction between possession obtained by a trick and possession under a contract voidable for fraud noted by Lord Blackburn in *Cole* v. *North Western Bank*. (4) These considerations seem to me decisive of the crucial question in this case. By sending the bill of lading and the bill of exchange direct to Pintscher, Steinmann & Co. constituted him bailee of both of them. It seems impossible to say that there was any wrongful taking by Pintscher. There was no trick which would have negatived a bailment. If he became criminally responsible

(1) [1899] 1 Q. B. 643
(2) 4 B. & S. 270.
(3) 7 H. & N. 661.
(4) L. R. 10 C. P. 354, at p. 373.

for his subsequent dealing with the bill of lading, it must have been as bailee, which presupposes a taking by consent. The circumstances of the obtaining possession would not have supported an indictment for larceny, and the subsequent abuse of his opportunity could not alter the character of the original taking." In interpreting the section the Lord Justice, therefore, held that, when a state of things exists which in the eye of the law negatives consent by the owner of the goods to their possession by the mercantile agent, the protection given by the section, which depends on such consent, does not extend to the case. I loyally accept that decision, which indeed really expresses what my own opinion on the matter would have been independently of it. It has been urged upon us that the opinion so expressed by the learned Lord Justice was merely an obiter dictum, because in that case it was decided that possession was not obtained by larceny by a trick, and therefore the provisions of the Factors Act, 1889 applied. I do not think that what the Lord Justice said can be regarded as merely an obiter dictum. It was necessary for the purposes of the decision to interpret s. 2 of the Factors Act, 1889, and accurately to delimit the scope of the word "consent" as therein used, so that the interpretation thus given was part of the ratio decidendi. It was the interpretation of the section which the Court adopted as the basis of its decision. Having arrived at the conclusion that, if there was a larceny by a trick, there was no such consent as was required by the section, they decided the case in the way they did, because the facts shewed that possession of the goods was not obtained by larceny by a trick. I do not see how the Court could possibly have come to any other conclusion as to the meaning of the words of the section than they did. A mercantile agent is as capable of stealing as any other man, and, if he has stolen the goods, there can be no question, in my opinion, that he must be taken to hold possession of them without the consent of the owner. One of the recognized methods of stealing at common law is distinguished from other types of larceny, and called larceny by a trick, but it is in the eye of the law pure stealing. The indictment in respect of it is in exactly the same terms as the indictment in any other kind of larceny,

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and the person accused thereby of having "taken" the goods must, in order to be convicted, be found guilty of having "taken" them. It follows that the law recognizes a form of larceny in which the apparent delivery of the possession of goods by the owner of them, which has been obtained by a trick animo furandi, does not in law import consent to that possession by the owner, so that the person who obtained that possession may be treated as having "taken" the goods without the owner's consent. Neither of my learned brothers appears to have any doubt as to this being the law on the subject.

But, assuming this to be the law, the question arises whether the verdict of the jury to the effect that Schwabacher obtained possession of the diamonds in this case by larceny by a trick can be supported. For the purpose of answering that question we need an accurate definition of larceny by a trick, in order that upon an examination of the evidence we may see whether the elements necessary to constitute that offence exist in the present case. The industry of the counsel for the defendant Broadhurst has resuscitated a number of cases, which illustrate how the infinite variety of the circumstances under which fraud and theft may be committed gives rise to delicate and difficult questions as to whether a particular case falls on one side or the other of the dividing line between the offence of larceny and that of obtaining goods by false pretences; but there is a case which I think enables us to draw the line with regard to what constitutes larceny by a trick with sufficient accuracy for the purposes of the present case. I refer to the case of *Reg.* v. *Buckmaster*. (1) In that case Manisty J. (2) said, in giving judgment: "On the authorities it is settled law that, if the owner of goods or money parts with the possession, and does not intend to pass the property, and there is at the time an intention to steal in the mind of the person who obtains the possession, that is evidence of larceny." I will not enter into the question whether that definition may not be somewhat too narrow. What has been said in some of the decisions on the subject leads me to doubt whether there may not possibly be cases in which, even though there was an intention

(1) 20 Q. B. D. 182. (2) Ibid. at p. 187

to part with the property, there may be larceny by a trick; but I will take for the purposes of the present case the definition so given, which is in effect that, where the owner of goods is, by a trick employed by a person animo furandi, induced to part with possession of the goods to that person, not intending to pass the property, so that the person getting possession of the goods steals them then and there, that is larceny by a trick. The question then is whether there was in this case evidence upon which the jury might properly find the existence of the essential elements involved in that definition. I think there was such evidence. The issue was placed before the jury most accurately and carefully by the learned judge, and it appears to me that the effect of his summing up was to increase any difficulty which the jury might feel in arriving at the conclusion that there had been larceny by a trick rather than improperly to lessen it. These cases shade into one another by almost imperceptible degrees, and the offences of larceny by a trick, larceny by a person as bailee, and obtaining goods by false pretences are often almost undistinguishable under the circumstances of particular cases; but the crucial point for the purpose of establishing larceny by a trick, as distinguished from larceny by a bailee, seems to me to be that there should have been an intention at the moment of obtaining possession of the goods then and there to steal them. A man may get possession of goods, thinking that he may thereby be enabled at a later period to appropriate them. He may obtain possession of them, contemplating the disposition of them wholly or partly for the benefit of their owner, but desiring to have in his hands the power of misappropriating them, if later on he wishes to do so. In such cases he becomes a bailee of the goods, and, if he misappropriates them subsequently, he is guilty of larceny as a bailee. In such a case, to go back to the language used by Collins L.J. in *Cahn* v. *Pockett's Bristol Steam Packet Co.* (1), there is no larceny by a trick which would negative a bailment. The person receiving possession of the goods has accepted it as a bailee. In this case were the jury entitled to come to the conclusion that it was the intention of Schwabacher, when he received these diamonds, then and there to steal them?

(1) [1899] 1 Q. B. 643, at p. 659.

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The question is no doubt a somewhat difficult one, but, in dealing with it, I think one must consider the whole of these proceedings of Schwabacher, which extended over several months. I can imagine that, with regard to the earlier stages of Schwabacher's proceedings, a jury might possibly think that, though possession of the diamonds was obtained by him by a false representation, he did not intend then and there to steal them, but obtained possession of them as a bailee. But, as time went on, and he continued selling the diamonds of which he obtained possession from the plaintiff at lower prices than those for which he had to account to the plaintiff, and was thus getting into greater and greater straits, it appears to me that his proceedings tended more and more to assume the complexion of pure stealing; and a jury would be justified in believing that he obtained possession of the diamonds in question in this action with the mere intention of then and there stealing them. It appears from the evidence that he took back to the plaintiff packets of diamonds sealed up, with the name of Pinto Leite & Nephews written upon them, as if he had had an offer from them, and the price which he said that they had offered, and which was accepted by the plaintiff. These diamonds were thereupon given back to him, not to shew to Pinto Leite & Nephews, or anyone else, in order to get an offer for them, but for the purpose of delivering them to Pinto Leite & Nephews in performance of the bargain. Under such circumstances there is strong ground for inferring that his proceedings with regard to those diamonds amounted to mere stealing by a trick. In my opinion the jury were entitled, upon consideration of the whole of the evidence, to infer that, with regard to the diamonds in question in this action, there was really no bailment of them to Schwabacher, or any intention by him to receive them as a mercantile agent, but that they were as much stolen from the plaintiff as if, behind the plaintiff's back, Schwabacher had abstracted them from his desk and put them in his pocket. I cannot say, considering the whole of the circumstances, that the jury would be wrong in coming to the conclusion that, when in the months of September and October Schwabacher obtained possession of diamonds from the

plaintiff, being on the verge of flight from the country, he was simply stealing them, and that is the sense in which I read their finding. The learned judge carefully told them that, in order to come to that conclusion, they must be satisfied that there was an intention on the part of Schwabacher, at the time when he obtained possession of the diamonds, then and there to steal them, so that a constable would be entitled then and there to arrest him for larceny. I think that direction excludes the possibility of the jury having given the verdict which they did give when in fact they thought that Schwabacher was guilty of larceny as a bailee subsequently to obtaining possession of the goods. I cannot, speaking for myself, say that I think the finding of the jury in this respect was an unreasonable one, and, as I have said, assuming it to be correct, it negatives the existence of consent by the plaintiff to Schwabacher's possession of the goods.

KENNEDY L.J. I have come to the same conclusion as to the result of these applications.

Taking first the question with regard to the liability of the defendants Frazer & Wyatt, it seems to me sufficient to say that, in my opinion, they cannot bring themselves within the protection given by the Factors Act, 1889, s. 2, sub-s. 1, by reason of the transactions by which they came into possession of the diamonds being joint transactions by them and the defendant Broadhurst, whom the jury have found not to have acted in good faith. They were, in the ordinary sense of the word, partners in those transactions with him. On the question how far they were partners with him in the legal sense of the term I will say a word or two in a moment. As co-adventurers they and Broadhurst obtained possession of the diamonds under the disposition made by Schwabacher; and, if the finding that the defendant Broadhurst did not act in good faith is to stand, then I think there must be judgment, not only against him, but also against the defendants Frazer & Wyatt. I have not overlooked the argument put forward by their counsel on this point. They admit that the transaction here was not a purchase by Frazer & Wyatt only, and then a subsequent agreement by them to give Broadhurst a half-share of the profits, but a

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transaction on joint account from the first; but they argue that, as a matter of business, what is called a transaction "on joint account" may take place without its involving in point of law the existence of any relation of partnership between the parties. I agree that there may be such transactions which do not involve partnerships in law. As an illustration of this I may refer to the case of *London Financial Association* v. *Kelk* (1), where it was held that the entering by three parties into an agreement to purchase an estate "on joint account" did not, under the circumstances of that case, constitute a partnership between them. As regards the effect of a joint transaction each case must, I think, stand on its own facts. It may often be difficult in particular cases exactly to define the constituents of a partnership in the legal sense, as now laid down by statute and the decisions, so as to differentiate them from those of a joint transaction which does not amount to a partnership. It is not necessary, I think, for the purposes of our decision in the present case to decide that the defendants Frazer & Wyatt and the defendant Broadhurst were partners in these transactions in the full legal sense of the term. The relation which existed between them, and by virtue of which they obtained possession of the diamonds, was such that, in my opinion, if Broadhurst acted in bad faith in the matter, and therefore, not being able to bring himself within the protection given by the Factors Act, is liable to the plaintiff, they must be under the same liability.

With regard to the finding of the jury that Broadhurst did not act in good faith, I do not desire to say more than that the arguments of his counsel have not satisfied me of either of the two things which would be necessary to justify us in setting aside the finding, namely, that there was no evidence to support it, or that the evidence was not such that the jury could reasonably find the verdict which they did, or, in other words, that the verdict was against the weight of the evidence. I think that there was evidence for the jury. I am not prepared to say that, if they had found the other way, we could have interfered with their verdict; but there were important considerations on both sides, the comparative weight of which it was for them to estimate, and, the jury having

(1) (1884) 26 Ch. D. 107.

done so, I cannot say that, there being evidence to support the finding at which they arrived, that evidence was so slight or insignificant in amount that we should be justified in ordering a new trial.

With regard to the remaining question, namely, as to the effect of the finding of the jury that Schwabacher, in obtaining possession of the diamonds, was guilty of larceny by a trick, I desire to say only a few words. If I do not venture to express quite so definite an opinion on some of the points involved as my brother Fletcher Moulton, it is because, in dealing with a case in which it is not necessary actually to decide those points, and particularly as we are sitting in a civil Court, and the case concerns matters which involve questions of criminal law, I am anxious not to say more than may be requisite for the purpose of explaining my views with regard to the case before us. For the purposes of s. 2, sub-s. 1, of the Factors Act, 1889, the goods must be in possession of the mercantile agent with consent of the owner. In my view "consent" there means that which the law regards as consent, and, if a person is found to have stolen goods from another, and so obtained possession of them, I do not think he can be considered to have been in possession of them with the consent of the owner within the meaning of the section. The expression "larceny by a trick" is not really a legal expression indicating a distinct kind of larceny. It is merely a convenient, or perhaps it may be said, having regard to the questions which have been raised in this case, an inconvenient, mode of describing certain cases of larceny in which the goods have neither been taken by force nor clandestinely without the knowledge of the owner. The cases so described are none the less cases of stealing. The matter is put as well as it can be in Pollock and Wright on Possession in the Common Law, pp. 218, 219, where, under the head of "Consent neutralized by animus furandi," the late Sir Robert Wright deals with the case where a person receives a thing from the owner at his request, intending to appropriate it, and knowing that the owner does not intend him to appropriate it. In this case I think, with the utmost respect for the opinion of Channell J., that, if the finding that the diamonds were obtained by theft from the plaintiff was justified, there is an end of any defence

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under the Factors Act, 1889. I should be very slow to differ from the learned judge on a point of law. I think what he must have had in his mind was that the finding of the jury was wrong, because, upon the facts proved, a finding that Schwabacher had committed larceny of the diamonds by a trick, so that he could have been convicted of larceny immediately on obtaining possession of them, could not be supported. In summing up, the learned judge appears to have clearly indicated to the jury his opinion that the case was one of obtaining goods by false pretences, or larceny by a bailee; and, when he said afterwards on further consideration that he did not agree, either in fact or in law, with the finding, I think what was in his mind was that the facts of the case clearly shewed that the diamonds had from time to time been handed to Schwabacher by the plaintiff with the intention on his part of passing the possession of them to Schwabacher as a mercantile agent under such circumstances as to exclude the possibility of his being found guilty of larceny by a trick in obtaining possession of them, and that it was in that sense that he said that the finding of the jury was immaterial. If it were necessary for the purposes of this appeal to discuss, with reference to the circumstances of this case, the abstract question as to what constitutes the dividing line between larceny by a trick and obtaining goods by false pretences, which was dealt with by my brother Fletcher Moulton, I must say, with great respect to him, that I do not think the matter very clear on the cases. In cases which have come before one on circuit one has often found great difficulty in distinguishing exactly between the two classes of offence, larceny by a trick and obtaining goods by false pretences, and in determining the extent to which it may be necessary to shew that there was no intention to pass the property, in order to bring a case within the category of larceny by a trick. I desire to guard myself by saying that, if it were necessary to discuss the matter further, I think possibly something might be said for the view that, within the meaning of the expressions used in some of the decisions on the subject, there was here such an intention by the plaintiff, on handing the diamonds in question to Schwabacher, not only to pass the possession of them, but also

to confer the power to pass the property in them, as would prevent the case from coming within the definition of larceny by a trick. I am not sure that, if it were necessary to consider the point, I should differ from Channell J. in thinking that the finding ought to have been that the offence of which Schwabacher was guilty was either obtaining possession of the diamonds by false pretences or dishonestly dealing with them subsequently so as to be guilty of larceny as a bailee; but I should respectfully differ from him if he meant to say that, though in truth there was larceny of the diamonds by a trick on the part of Schwabacher, nevertheless there was consent to his possession of them by the plaintiff for the purposes of s. 2 of the Factors Act, 1889. I agree with the learned judge that, unless the facts shewed an actual larceny in obtaining possession of the diamonds, no mere fraud in obtaining such possession, or any subsequent dealing with them in a felonious way by Schwabacher as a bailee, could prevent the protection of the Factors Act from being applicable to the case. It is not, in the view which we have taken, really necessary to express any opinion on the point; but, as I have said, my opinion is that, if the jury intended to find, and the facts were sufficient to justify them in finding, that Schwabacher was guilty of larceny by a trick in the sense that there was a larceny at common law, there ought to be judgment both as against the defendants Frazer & Wyatt and the defendant Broadhurst. In this particular case I should have grave doubt whether the finding of the jury to that effect could be justified. That, however, would only involve a new trial, and it is not necessary under the circumstances to come to a definite conclusion, because the point with which I first dealt is sufficient to decide the case.

Judgment for the plaintiff against all the defendants, and application of defendant Broadhurst dismissed.

Solicitor for the plaintiff: *Julius A. White.*

Solicitors for the defendants Frazer & Wyatt: *F. Kimber Bull & Duncan.*

Solicitors for the defendant Broadhurst: *Baker, Freeman & Co.*

E L.

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March 26.

EVANS, Appellant; WEATHERITT, Respondent.

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 25—*Milk—Written Warranty—Future Deliveries—Evidence in Writing to connect Particular Consignment with Warranty.*

By a contract in writing, the appellant agreed to purchase from a company "the whole of the milk required for his dairy" for twelve months from October 1, 1905, and the contract contained a warranty that all milk to be delivered by the company to the appellant should be pure. In June, 1906, milk was delivered to the appellant by the company under the contract accompanied by a delivery note, which shewed that the milk came from the company, but which did not in terms refer to the contract. Some of the milk was sold by the appellant, and was found upon analysis to have had 28 per cent. of milk fat abstracted from it. On an information against the appellant for having sold the milk contrary to the provisions of the Sale of Food and Drugs Act, 1875, the appellant relied on the warranty contained in the contract as a defence under s. 25 of the Act:—

Held that, as the warranty was by the contract expressly applied to all milk sold by the company to the appellant during the specified period, the contract itself was sufficient evidence in writing to connect the particular consignment of milk with the warranty, and that the requirements of s. 25 had been satisfied.

Watts v. *Stevens*, [1906] 2 K. B. 323, distinguished.

Case stated by a metropolitan magistrate.

The appellant was summoned to answer a complaint made by the respondent, a sanitary inspector, for that the appellant did on June 27, 1906, unlawfully sell to the respondent an article of food, to wit milk, from which 28 per cent. of milk fat had been abstracted, so as to affect injuriously its quality, substance or nature, without making disclosure of the alteration, contrary to s. 9 of the Sale of Food and Drugs Act, 1875.

At the hearing of the complaint the following facts were admitted or proved in evidence:—The sale of the milk and the analyst's certificate were admitted by the appellant. Within the period prescribed by the Sale of Food and Drugs Acts, 1875 and 1899, the appellant duly sent to the respondent, who duly received the same, a copy of a contract dated October 2, 1905, made between the Great Western and Metropolitan Dairies, Limited, of 9, Harrow Road, London, as vendors of the one part,

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and the appellant as purchaser of the other part, by which the appellant agreed to purchase of the vendors "the whole of the milk required for his dairy" for twelve months certain from October 1, 1905, and until one week's notice should be given by either side to terminate this agreement." The contract contained the following clause: "All milk to be delivered by the vendors at the purchaser's address in a sweet, pure and saleable condition, and warranted by them pure with all its cream as received from the cow, but no responsibility will be taken by the vendors after delivery."

The milk the subject of the proceedings was delivered by the company's servant at 12.15 P.M. on June 27, 1906, to the appellant personally under and by virtue of the contract, and it was sold to the respondent in the same state as it was received by the appellant, and the appellant had no reason to believe at the time when he sold it that the milk was otherwise than was required to be delivered to him by the Great Western and Metropolitan Dairies, Limited, under the contract. At the time the milk was so delivered to the appellant there was delivered to the appellant by the company's servant a delivery note, which was addressed to the appellant and contained the words, "Please receive from the Great Western and Metropolitan Dairies, Limited," but which did not contain any reference to the contract of October 2, 1905.

It was contended on behalf of the respondent that the warranty contained in the contract of October 2, 1905, being a general warranty, did not apply to any particular consignment, and that there was nothing in writing to connect the contract and warranty with the particular consignment of June 27, 1906, as the delivery note, whilst it related to the particular consignment, did not in any way refer to the contract and warranty, nor was there any kind of warranty on the face of the delivery note itself. The authority relied upon by the respondent in support of the above contentions was *Watts* v. *Stevens*. (1)

On behalf of the appellant it was contended that the delivery note referred to was a sufficient document in writing to connect the particular consignment of June 27, 1906, with the contract

(1) [1906] 2 K. B. 323.

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and warranty; that the parties' names mentioned in the delivery note were the same as those to the contract; and that, as it was proved that the particular consignment was made under and by virtue of the contract, it followed that the handing to the appellant of the delivery note was also something done under and by virtue of the same contract, and that there was, therefore, a sufficient writing to connect the particular consignment with the contract.

The magistrate was of opinion that the delivery note was not a sufficient connection in writing of the particular consignment with the contract, and that therefore, on the authority of *Watts* v. *Stevens* (1), there was no warranty covering the particular consignment. He accordingly convicted the appellant.

The question for the opinion of this Court was whether the magistrate, upon the above statement of facts, came to a correct determination and decision in point of law. (2)

Avory, K.C., and *Bailhache*, for the appellant. The magistrate misinterpreted the effect of the decision in *Watts* v. *Stevens*. (1) The Court did not there hold that there must in every case be a separate document connecting the article sold with the warranty previously given, but that since there was no written evidence connecting the particular consignment of milk with the warranty relied on, which was not contained in the contract, but was a general warranty given at a later date, the provisions of s. 25 had not been complied with. Here the contract itself, which is in writing, contains an express warranty, and the contract is for the purchase by the appellant from the company of all milk required by him for his dairy during the twelve months from the date of the contract. In *Watts* v. *Stevens* (1) the contract

(1) [1906] 2 K. B. 323.

(2) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence."

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was not for the purchase of all the milk required by the respondent. This milk was received by the appellant during the period of twelve months, and the delivery note is evidence that it was sold to the appellant by the company, and therefore it must have been sold under the contract and with the warranty. No further evidence in writing is necessary to connect this consignment of milk with the warranty, and the fact that the delivery note did not in terms refer to the contract is immaterial. Where the contract itself contains the warranty, and clearly must cover the particular article in question, there is no necessity for a second document. All the requirements of s. 25 were satisfied, and the appellant ought not to have been convicted.

S. G. Turner (*Courthope Munroe* with him), for the respondent. The conviction was right. The effect of the decision in *Watts* v. *Stevens* (1) is that, where there is a warranty relating to future deliveries of milk, there must be some evidence in writing to connect any particular consignment with the warranty. Here the delivery note does not in terms refer to the contract of October 2, 1905, and, therefore, oral evidence is necessary to prove that this milk was in fact supplied under that contract, and *Harris* v. *May* (2), which was followed in *Watts* v. *Stevens* (1), shews that, that being so, the defence set up under s. 25 must fail. [He referred to *Whitaker* v. *Pomfret*. (3)]

LORD ALVERSTONE C.J. In my opinion the magistrate has erred in this case by attaching too much importance to the fact that this particular consignment of milk was accompanied by a delivery order, which identified it as coming from the Great Western and Metropolitan Dairies, Limited, and he appears to have thought that the Court intended to lay down in *Watts* v. *Stevens* (1) that the written connection between a particular consignment of milk and a previous warranty could only be proved by the production of a delivery order containing some statement which connected the particular consignment with the warranty. The case turns on s. 25 of the Sale of Food and Drugs Act, 1875. I do not intend to go through all the decisions

(1) [1906] 2 K. B. 323. (2) (1883) 12 Q. B. D. 97.
(3) [1902] 1 K. B. 661.

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which have been given on this section. They were very fully considered in *Watts* v. *Stevens* (1), and I accept, as I am bound to do, the law as I endeavoured to lay it down in that case; but when the judgments of Darling J. and myself in that case are considered as affecting the question whether in this case there was any evidence in writing of a connection between this consignment of milk and the warranty, it will be found that there is nothing in those judgments conflicting with the view which I am about to express. Darling J. said (2): "In my opinion, according to the cases which have been decided on this question, some connection must be established between any particular article subsequently supplied and the warranty which is relied on. It may be that the circumstances of this case are such as to give the respondent a right of action against his vendor for breach of warranty, but I have come to the conclusion that there is not sufficient evidence connecting the particular consignment of milk in question with the warranty contained in the letter of August 5, 1905, so as to enable the respondent to bring himself within the protection afforded by s. 25 of the Act"; and at the end of his judgment he said: "I think that there is good reason why a person in the position of the respondent should not be permitted to rely on the terms of a general contract, or warranty, made some time before the particular goods are supplied. It is much more likely that he will in that case be careless and supply inferior goods than he would be if he were bound to give a separate warranty with each particular consignment, or, at any rate, a writing expressly connecting the consignment with the warranty previously given." I point out that Darling J. did not say that there must be a writing given on each particular occasion, but that it must refer to each particular consignment. In the same case I said (3): "I share with Darling J. the feeling of objection to holding that s. 25 is satisfied by a general contract which may have been in existence for years, and which can only with great difficulty be identified by the purchaser as relating to the particular goods in respect of which complaint is made. The warranty referred to in s. 25 does not, in my opinion, point

(1) [1906] 2 K. B. 323. (2) [1906] 2 K. B. at p. 328.
(3) [1906] 2 K. B. at p. 334.

merely to a general right of action, but to a specific contract applicable to the goods in question." That is the test which I intended to lay down, but I did not say, and I did not mean, that that special contract could only be proved by a written paper attached to each can of milk. Later on in the same judgment I pointed out that I dissented from *Elliot* v. *Pilcher* (1), as I still do, in so far as it decided that no writing was necessary to connect the particular consignment with the warranty, and when considering the case of *Harris* v. *May* (2) I quoted from my judgment in *Irving* v. *Callow Park Dairy Co.* (3), where I am reported to have said: "Having regard to more recent cases I doubt whether *Harris* v. *May* (2) can be regarded as law. If it was meant to lay down any general principle it has certainly been qualified by later cases." What I meant was that the construction which had been placed on *Harris* v. *May* (2) in some of the later cases cannot be supported. That that was clearly my meaning appears from the passage at the end of my judgment in *Watts* v. *Stevens* (4), where I point out that when it is remembered that my observations in *Irving* v. *Callow Park Dairy Co.* (3) were made "in reference to a memorandum or label which was on each churn, I do not think that it can be used in support of the view that there need be no writing connecting the warranty with a particular consignment of goods." The case of *Watts* v. *Stevens* (4) was decided after a very full consideration of all the authorities, and it was held that there must be some writing connecting the particular consignment with the warranty, and that a mere general statement by the vendor that he warranted all the milk supplied by him to the purchaser was not sufficient. Applying that principle to the facts of the present case, it is not suggested that the appellant received milk from anyone but the Great Western and Metropolitan Dairies, Limited; he proved the receipt of this particular consignment from that company, and he produced the contract of October 2, 1905, which shewed that all his milk came from that company's dairy. In my judgment that document is in these circumstances sufficient on its face to shew the requisite written connection between this consignment of

(1) [1901] 2 K. B. 817.
(2) 12 Q. B. D. 97.
(3) (1902) 87 L. T. 70.
(4) [1906] 2 K. B. 323.

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milk and the warranty contained in the contract. In my opinion the magistrate fell into error in thinking that that written connection could only be proved in one particular way; but, having regard to the terms of the contract, I am of opinion that there is in this case a writing connecting this milk with the warranty in the contract, and this appeal must therefore be allowed.

DARLING J. I have come to the same conclusion, though not without some difficulty; but, having regard to the various decisions on this question, it is almost impossible to come to a conclusion which will not be at variance with some of the previous cases. It appears to me that the facts in the present case are sufficiently different from those in *Watts* v. *Stevens* (1) to enable our decision in this case to be reconciled with that case. In *Watts* v. *Stevens* (1) there was a contract for the supply of milk to the respondent, and after the making of the contract the vendor gave the respondent a letter guaranteeing that the milk supplied was perfectly pure; but there was nothing on the face of the letter to shew that the warranty applied to more than one consignment of milk, and this Court held that, in order to enable the respondent to avail himself of the warranty as a defence to the prosecution, it was necessary to shew some connection in writing between the warranty and the particular consignment of milk in question. But the Court did not say that the contract itself might not supply that necessary written connection. In the present case the appellant bought the milk under a contract by which he agreed to purchase from the vendors "the whole of the milk required for his dairy." The milk in question was required by the appellant for his dairy, and, unless there was evidence that he had broken his contract by getting milk elsewhere, it follows that the milk must have been supplied by the vendors under this contract, and it was therefore covered by the warranty contained in the contract. The delivery ticket which was handed to the appellant at the time of the delivery of the milk, though not necessary, in my opinion, to connect the milk with the contract, is nevertheless a valuable piece of evidence, and being in writing is more valuable than oral evidence. The

(1) [1906] 2 K. B. 323.

delivery ticket shews that on June 27, 1906, milk was supplied to the appellant by the Great Western Dairies, Limited—that is to say, it shews that the milk was supplied to the appellant by the other party to the contract at a date when the contract was in force, for the contract was to supply the appellant with all the milk he required for his dairy for twelve months from October 1, 1905.

I am conscious that something that I said in *Watts* v. *Stevens* (1) may possibly have given rise to the difficulty in this case. At the end of my judgment I gave a general reason for my decision, and in giving that reason, which was a sort of unnecessary justification for the legislation, I used language which, if construed in its widest sense, may have misled the magistrate into thinking that a general warranty given some time before the supply of the milk could in no case be relied on as a defence under the Act.

A. T. LAWRENCE J. I am of the same opinion. I think that the essential difference between this case and *Watts* v. *Stevens* (1) is that in the earlier case it was found as a fact that the milk had not been purchased with any warranty unless a letter from the vendor to the respondent, written after the contract had been made, could be regarded as a warranty applying to the particular consignment of milk in question; and it was held that there must be some written evidence connecting the milk with that warranty. But in the present case it is found that the milk was delivered to the appellant under and by virtue of the contract of October 2, 1905, which is a contract for the sale to the appellant of the whole of the milk required for his dairy, and which contains an express warranty covering all the milk to be supplied to the appellant under the contract. These findings of fact clearly distinguish the present case from *Watts* v. *Stevens* (1), and, looking at the language of s. 25 of the Act of 1875, I cannot give any construction to it which will have the effect of making this warranty other than a written warranty given with the article purchased. The words are "purchased . . . . with a written warranty." It is impossible to give any

(1) [1906] 2 K. B. 323.

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meaning to the words of s. 25 without holding that they are satisfied by the facts found in this case.

Appeal allowed.

Solicitor for appellant: *John T. Lewis.*
Solicitor for respondent: *G. C. Topham.*

F. O. R.

1907

March 26

WILLIAMS, APPELLANT; RICHARDS, RESPONDENT.

Dog—Not kept under Control—"Dangerous"—Evidence—Attacks on Sheep—Dogs Act, 1871 (34 & 35 *Vict. c.* 56), *s.* 2.

The fact that a dog has attacked and killed sheep is evidence that it is "dangerous" within s. 2 of the Dogs Act, 1871.

CASE stated by justices for the petty sessional division of the Hundred of Swansea, in the county of Glamorgan.

A complaint was made by the appellant before the justices for that on September 10, 1906, at Cockett, in the said county, a certain dangerous dog, of which the respondent was the owner, was not kept under proper control; and the appellant asked that an order should be made that the dog be kept under proper control or destroyed under the provisions of the Dogs Act, 1871. (1)

Upon the hearing of the complaint, a witness called on behalf of the appellant stated that he knew the respondent's dog, and that he had seen it kill sheep and lambs.

The solicitor for the respondent thereupon intimated that (without admitting that the dog had killed or attacked sheep) he took the objection that, if the appellant could only produce evidence to shew that the respondent's dog had killed or attacked

(1) The Dogs Act, 1871 (34 & 35 Vict. c. 56), s. 2: "Any Court of summary jurisdiction may take cognizance of a complaint that a dog is dangerous, and not kept under proper control, and if it appears to the Court having cognizance of such complaint that such dog is dangerous, the Court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed, and any person failing to comply with such order shall be liable to a penalty not exceeding twenty shillings for every day during which he fails to comply with such order."

sheep, such evidence would not be sufficient to support the complaint, and he contended that, to prove that the dog was dangerous, evidence should be given to shew that the dog was dangerous to mankind.

It was admitted by the solicitor for the appellant that he had no evidence to shew that the dog was dangerous to mankind, but he stated that he could prove by witnesses who were in attendance that the dog had on other days than that spoken to by the first witness attacked and worried sheep, and he submitted that that evidence would be sufficient to support the complaint; and he formally tendered these further witnesses, but they were not called, because the justices were of opinion that in order to support the complaint some evidence should be given to shew that the dog was dangerous to mankind, and they referred to *Osborne* v. *Chocqueel* (1) and the Dogs Act, 1906 (6 Edw. 7, c. 32), s. 1, sub-s. 4, and they decided, as no evidence was adduced before them to shew that the dog was dangerous to mankind, to dismiss the summons.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law.

E. G. Jellicoe, for the appellant. The fact that a dog attacks sheep is evidence that it is "dangerous" within s. 2 of the Dogs Act, 1871. The question is one of degree. For the purpose of obtaining an order under that section it is not necessary to establish ferocity towards mankind. The remedy given by the Act of 1871 is intended as an extension of the Dogs Act, 1865 (28 & 29 Vict. c. 60), which made the owner of a dog liable in damages for injury to cattle or sheep without proof of a previous mischievous propensity on the part of the dog.

L. M. Richards, for the respondent. The justices rightly dismissed the summons, for there was no evidence that the dog was dangerous. The Act of 1865 speaks of the "mischievous propensity" of dogs; the Act of 1871 for the first time introduces the word "dangerous," and, as was said by Lush J. in *Pickering* v. *Marsh* (2), "the Act was passed to give further

(1) [1896] 2 Q. B. 109. (2) (1874) 43 L. J. (M.C.) 143.

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powers to magistrates for the protection of the public against dogs." A dog which attacks sheep only, and not mankind, is not one against which the public need protection, and is, therefore, not a dangerous dog: *Osborne* v. *Chocqueel.* (1) The Dogs Act, 1906 (which had not come into force at the date of this summons), provides by s. 1, sub-s. 4, that "Where a dog is proved to have injured cattle or chased sheep it may be dealt with under s. 2 of the Dogs Act, 1871, as a dangerous dog." This enactment supports the view taken by the justices as to the meaning of the word "dangerous" in s. 2 of the Act of 1871, for otherwise s. 1, sub-s. 4, of the new Act would not have been required.

LORD ALVERSTONE C.J. In this case the magistrates dismissed the summons, without having heard all the evidence that was tendered on behalf of the complainant, on the ground that to justify an order under s. 2 of the Dogs Act, 1871, there must be evidence that the dog is dangerous, not only to animals, but also to mankind. Having regard to the fact that the previous legislation, namely, the Dogs Act, 1865, shews that the intention was to protect people's property, I can see no reason why the word "dangerous" in s. 2 of the Act of 1871 should be construed as meaning only "dangerous to mankind." I do not express any opinion as to what the decision of the magistrates ought to be, but in my opinion the evidence tendered was admissible, and the case must therefore go back to the magistrates for them to hear and deal with it on its merits.

The magistrates appear to have been misled, not unnaturally, by s. 1, sub-s. 4, of the Dogs Act, 1906; but for the purpose of the present case it is not necessary to consider what is the meaning of that section.

DARLING and A. T. LAWRENCE JJ. concurred.

Appeal allowed: Case remitted to justices.

Solicitors for appellant: *Metcalfe & Sharpe, for Leyson, Swansea.*

Solicitor for respondent: *Rex Woods, for Andrew & Thompson, Swansea.*

[1) [1896] 2 Q. B. 109.

F. O. R.

SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE AND OTHERS, APPELLANTS; LONDON COUNTY COUNCIL, RESPONDENTS.

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March 18.

London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*) *s.* 31—*General Building Line—Certificate of superintending Architect—Railway Company—Interference with Exercise of Statutory Powers of—Appeal to Tribunal of Appeal—Jurisdiction.*

The Tribunal of Appeal under the London Building Act, 1894, has no jurisdiction to entertain an appeal by a railway company against a certificate of the superintending architect defining the general line of buildings in a street if the only ground of the appeal is that the certificate would affect the exercise of powers conferred on the railway company by their special Acts.

CASE stated by the Tribunal of Appeal under the London Building Act, 1894.

The London, Chatham and Dover Railway Company and the South Eastern and Chatham Railway Companies' Managing Committee are the owners of certain land adjoining and abutting on the north-west side of Crystal Palace Parade, in the borough of Camberwell. On the said land are the Crystal Palace High Level Station and certain lines of railway. The station and railway lines are constructed on land which is about thirty feet below the level of Crystal Palace Parade. Separating the land of the said railway company and committee from the footpath on the north-west side of Crystal Palace Parade is a wall erected on the land of the railway company. The land in question was acquired by the London, Chatham and Dover Railway Company under and by virtue of the Crystal Palace and South London Junction Railway Act, 1862, and the London, Chatham and Dover Railway Act, 1875. By an indenture dated February 20, 1906, the London, Chatham and Dover Railway Company demised a portion of the said land to the Coal Co-operative Society, Limited, as tenants from year to year for the purpose of their erecting thereon a coal order office, and the said society proceeded to erect a building thereon for that purpose. The site of the said building is not superfluous land, and is situate within the curtilage of the Crystal Palace Station. On March 24, 1906,

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the superintending architect of metropolitan buildings, after hearing the said railway company and the said managing committee and the Coal Co-operative Society, hereinafter called the appellants, certified the general line of buildings on the north-west side of Crystal Palace Parade, and also certified that the building then being erected by the said society was partly situate in Crystal Palace Parade. The building projected beyond the general line so certified.

On April 9, 1906, the appellants delivered to the Tribunal of Appeal a notice of appeal against the superintending architect's certificate. In the statement of facts delivered by the appellants in accordance with the regulations to be followed in cases of appeal to the Tribunal of Appeal the appellants stated the following only as the grounds of their appeal:—

(*a*) That the letting of the piece of ground on which the building was being erected for the purpose of erecting a coal order office was ancillary to the business of the London, Chatham and Dover Railway Company and the managing committee;

(*b*) That the general building line defined by the said certificate made March 24, 1906, would interfere with the exercise of the statutory powers of the London, Chatham and Dover Railway Company and the managing committee. (1)

On April 10, 1906, a notice was served on the appellants by the solicitor of the London County Council calling upon the appellants to remove the building on the ground that it was being erected in contravention of the provisions of s. 22 of the London Building Act, 1894.

On May 1 the parties appeared before the Tribunal of Appeal, when the above facts were proved or admitted. The correctness of the certificate was not in any way questioned assuming the architect to have had power to define the general line of buildings

(1) Part III. of the London Building Act, 1894, comprises ss. 22—31. Sect. 22 prohibits building without the consent of the council beyond the general building line, which line is, if required, to be defined by the certificate of the superintending architect.

By s. 29: "Any person aggrieved by such certificate may appeal to the Tribunal of Appeal."

By s. 31: "Nothing in this part of this Act shall affect the exercise of any powers conferred upon any railway company by any special Act of Parliament for railway purposes."

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with reference to the building in question. Evidence was given by the appellants that the letting of the piece of ground on which the building was being erected was ancillary to the business of the appellant railway company. No evidence was given by the respondents.

On behalf of the appellants it was contended that under s. 31 of the London Building Act, 1894, the said building was exempt from the operation of Part III. of the said Act, and that the certifying by the superintending architect of the general line in question would affect the exercise by the railway company of their statutory powers.

On behalf of the respondents it was contended that the Tribunal of Appeal had no jurisdiction to decide the questions raised by the appeal.

The Tribunal of Appeal decided that the certificate did affect the exercise by the appellant railway company of the powers conferred upon them by their special Acts, and allowed the appeal. The respondents appealed.

Avory, K.C., and *R. Cunningham Glen*, for the London County Council. The only appeal given by the Act against the certificate of the architect is that given by s. 29 to a "person aggrieved," that is, a person whose rights will be interfered with by the certificate. Here the railway company say that they appeal not because they are wrongly prevented from building up to their boundary, but because they are exempt from the operation of the Act. If they are exempt they ought to have waited until they were summoned for non-compliance with the notice to remove the building and then taken the objection that the magistrate had no jurisdiction. The effect of the order of the Tribunal of Appeal allowing the appeal is that the certificate has been quashed, so that any owner of land in this street may with impunity build beyond the certified line up to his boundary. This result would happen in every case in which a railway company owned land projecting beyond the general building line.

Macmorran, K.C., and *Frank Mellor*, for the railway company. If, as is conceded by the county council, the railway company

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may take objection to the jurisdiction of the magistrate to order the removal of the offending building, upon the ground that the certificate cannot apply to them, why may they not take the objection to the validity of the certificate at the earlier stage before the Tribunal of Appeal, before the expense of proceedings to enforce the notice has been incurred?

DARLING J. In this case the superintending architect defined a general line of buildings, acting, in so doing, under s. 22 of the London Building Act, 1894. The railway company and the other parties interested then appealed under s. 29 to the Tribunal of Appeal, claiming that they were persons aggrieved by the certificate. They might have been persons aggrieved for various reasons, and had they been so the Tribunal of Appeal would have been right to allow their appeal and set aside the building line. But the reason why these particular appellants say that they are aggrieved is that s. 31 provides that "Nothing in this part of this Act," including s. 22, "shall affect the exercise of any powers conferred upon any railway company by any special Act of Parliament for railway purposes." They have caused to be erected upon their land a building for the purpose of the tenant receiving orders for the purchase of coal to be carried over the company's railway. All that the architect has done is to lay down a theoretical line of buildings; and that does not of itself affect the exercise of any power conferred on the railway company by their special Acts. It may be that in consequence of his having laid down the building line something may hereafter be attempted to be done which, if successful, would affect the exercise of the railway company's powers, but when that attempt is made, and they are summoned before the magistrate for non-compliance with the notice to remove the building from in front of the building line, they will have their remedy—they will be entitled to say that their building was erected in the exercise of their statutory powers, and that an order compelling them to put it back would be in contravention of s. 31; and the magistrate would have to hold that, though the building line held good so far as it affected the buildings of other owners, it did not apply to the appellants' building, because, if it did, it would

affect the exercise of their statutory powers. The case, therefore, resolves itself into the question which of two alternatives is to prevail—either there is to be a building line, but the railway company is not to be bound by it if it would affect the exercise of their statutory powers, or there shall be no building line at all in a street if, from its existence there, it might be contended that the railway company would suffer. I think the first alternative is the right one, that there may be a building line, but, on its being shown that it would affect the railway company's powers, no order is to be made which would apply the building line to their detriment. I think the wrong procedure was adopted here. The railway company have objected to what they have no right to object to. The order of the Tribunal of Appeal must be set aside.

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SOUTH EASTERN AND CHATHAM RAILWAYS MANAGING COMMITTEE *v.* LONDON COUNTY COUNCIL.

Darling J.

A. T. LAWRENCE J. I am of the same opinion. I think the appeal was misconceived. If, as was contended, this building was erected under the powers conferred by a special Act, then the building line did not affect it. The certificate is, so far as the railway company is concerned, a brutum fulmen. They have chosen to appeal against it, and the Tribunal of Appeal has chosen to set it aside. I think the Tribunal of Appeal was wrong in so doing.

Appeal allowed.

Solicitor for the railway company: *J. W. Watkin.*
Solicitor for the London County Council: *Seager Berry.*

J. F. C.

1907
March 25, 26.

PEARCE, Appellant; MAIDENHEAD CORPORATION, Respondents.

Local Government—Private Street Works—Objections—Determination by Court of Summary Jurisdiction—Right of Appeal to Quarter Sessions—Private Street Works Act, 1892 (55 & 56 *Vict.* c. 57), *ss.* 7, 8.

An appeal lies to quarter sessions from the decision of a Court of summary jurisdiction under s. 8 of the Private Street Works Act, 1892, determining the matter of objections to proposed works under the Act.

Special case stated by quarter sessions.

The appellant was the owner of certain premises fronting, adjoining, or abutting on certain private streets within the borough of Maidenhead, and known as Upper and Lower Garden Cottages. The respondents had adopted the Private Street Works Act, 1892.

On February 5, 1906, the respondents duly passed a resolution that the said private streets, amongst others, should be sewered, levelled, paved, metalled, flagged, channelled and made good, and that the expenses to be incurred in executing the said several works should be apportioned on the premises of the appellant, amongst others. At the same meeting the respondents approved the plans, specifications, and provisional apportionment of the borough surveyor for the said works. Due notice was given in accordance with law of this resolution, and a copy thereof was served on the appellant on February 9, 1906.

On February 28, 1906, the appellant gave to the respondents notice of objection on the ground that the proposed works were unreasonable and the estimated expenses excessive.

On April 17, 1906, the respondents duly gave notice that the justices of the peace for the borough of Maidenhead would determine the matter of the objection on May 14, 1906. (1)

(1) Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 8: "(1.) The urban authority at any time after the expiration of the said month may apply to a Court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors; and at the time

On May 14, 1906, the justices heard the application and the objection made as aforesaid by the appellant, and ordered that the said resolution, plans, and provisional apportionment should be upheld and confirmed.

The appellant gave notice of appeal against the order of the justices on the ground that the proposed works were unreasonable and the estimated expenses excessive. The appeal came on for hearing before the general quarter sessions of the peace of and for the county of Berkshire.

It was contended for the respondents, on a preliminary objection to the hearing of the appeal, that no such appeal lay from the order of justices sitting to determine the matter of objections on an application made as aforesaid under the Private Street Works Act, 1892, for the following, among other, reasons: That there was no provision in the said Act or otherwise giving the appellant the right of appeal, and that such right of appeal would be inconsistent with the special powers given to the justices under the said Act.

It was contended for the appellant that the appeal lay.

The Court of quarter sessions overruled the objection of the respondents, and, after hearing the case on the merits, allowed the appeal subject to this special case.

The question for the opinion of the Court was whether an appeal lies to the general quarter sessions of the peace from an order of justices made on an application and on the hearing of objections under s. 8 of the Private Street Works Act, 1892.

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and place so appointed any such Court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be, and with the same powers and subject to the same provisions with respect to stating a case, as if the urban authority were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The Court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority. The Court may also, if it thinks fit, adjourn the hearing and direct any further notices to be given. (2.) No objection which could be made under this Act shall be otherwise made or allowed in any Court proceeding or manner whatsoever."

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Cecil Walsh, for the respondents. (1) The procedure to be followed in the case of objections to proposed works under the Private Street Works Act, 1892, is provided by s. 8 of the Act, namely, by an application to a Court of summary jurisdiction to hear and determine the matter of the objections, and on the application the Court has under that section very full powers of dealing with the matter. No right of appeal to quarter sessions from the order of the justices is given by the Act; and, therefore, none exists. The procedure under s. 8 is intended to be a substitute for the appeal to the Local Government Board given by s. 268 of the Public Health Act, 1875, in similar cases under s. 150 of that Act: *Hayles* v. *Sandown Urban Council*. (2) It will be contended that, as s. 1 of the Act of 1892 provides that the Act is to be construed as one with the Public Health Acts, the right of appeal to quarter sessions given by s. 269 of the Act of 1875 applies to orders made under s. 8 of the Act of 1892, but the Legislature has not said that the two Acts are to be treated as one Act for all purposes. This is not a question of construction, but of machinery, and an order made under s. 8 of the Act of 1892 cannot be deemed to be an order made under the Act of 1875, and, if so, it is not an order in respect of which a right of appeal to quarter sessions is given; on the contrary, s. 8 of the Act of 1892 contains express provisions as to what form the proceedings shall take, and the justices are given power to state a case. The Public Health Acts Amendment Act, 1890, which also is to be construed as one with the Public Health Acts expressly gives in s. 7 a right of appeal to quarter sessions which would have been quite unnecessary if the effect of construing an Act as one with the Public Health Act, 1875, is to incorporate into it the provisions of s. 269 of the Act of 1875. [He also referred to *Tracey* v. *Pretty*. (3)]

H. M. Sturges and *S. L. Porter*, for the appellant, were not called upon to argue.

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(1) The expressions "respondents" and "appellant" are throughout this report used to designate the parties who were respectively the respondents and appellant before the quarter sessions.

(2) [1903] 1 K. B. 169.

(3) [1901] 1 K. B. 444.

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LORD ALVERSTONE C.J. The question raised by this appeal is one of importance, and it is only by looking at the legislation as a whole that one can come to a right decision. The Court of quarter sessions has held that it has power to entertain an appeal from an order of a Court of summary jurisdiction made under s. 8 of the Private Street Works Act, 1892, on the hearing of objections to proposed works. I have pointed out in more than one case that, previously to the Act of 1892, the only remedy in respect of works under s. 150 of the Public Health Act, 1875, was to wait until the works had been completed and then to appeal to the Local Government Board under s. 268 of the Act. Then by the Act of 1892, as I observed in *Hayles* v. *Sandown Urban Council* (1), facilities are given to frontagers to object to the proposed works on the various grounds specified in s. 7, and by s. 8 the matter of these objections can be dealt with by a Court of summary jurisdiction before the works are carried out. It would have been quite possible for the Legislature to have enacted that the decision of the Court of summary jurisdiction on these questions should be final and not subject to an appeal to quarter sessions; but there are no words in s. 8 making the decision final and conclusive, nor are there any words from which it can fairly be concluded that it was intended that an order under s. 8 should be in any way different from other orders made under the Act of 1875. As to one of the grounds of objection mentioned in s. 7 of the Act of 1892—namely, that the street is a highway repairable by the inhabitants at large—it is, in my opinion, most important that there should be a right of appeal, because it has, I think, been held that the decision of the justices on that question is binding as against other persons besides the person actually making the objection—in other words, that it is in the nature of a judgment in rem. (2) It is true that the Act of 1892 is an adoptive Act, but it is to be construed as one with the Public Health Acts, and I can see no reason why the decision of a Court of summary jurisdiction under s. 8 is not included in the words of s. 269 of the Act of 1875, "order, conviction, judgment or

(1) [1903] 1 K. B. 169.

(2) See *Wakefield Corporation* v. *Cooke*, [1904] A. C. 31.

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PEARCE v. MAIDENHEAD CORPORATION.

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determination of or . . . . any matter or thing done by any Court of summary jurisdiction." There is nothing in the Act of 1892 to indicate that the decision of the justices is to be final, and in order to take away the right of appeal under s. 269 special language would have been required. For these reasons I have come to the conclusion that the decision of the quarter sessions was right, and that this appeal must be dismissed.

Reference was made in the course of the argument to a passage in my judgment in *Hayles* v. *Sandown Urban Council* (1), where I said: "It is true that the Act does not give any appeal to the Local Government Board, but other valuable rights and powers are given in substitution." I did not mean to say that the right of appeal to the Local Government Board was of necessity taken away. What I meant was that the Act of 1892 gave fresh and valuable rights and powers, and the preceding sentence—"I do not by any means consider that by adopting this Act a local authority deprives the ratepayers of the district of any rights or powers"—shews clearly that I did not intend to go further than that. The question of an appeal to the Local Government Board under s. 268 of the Act of 1875 was not before the Court in that case, and the passage referred to, when read with the context, does not decide that there may not also be an appeal to the Local Government Board.

DARLING J. I am of the same opinion.

A. T. LAWRENCE J. I agree.

Appeal dismissed.

Solicitor for appellant: *E. F. Jarvis, for Weed & Mason, Maidenhead.*

Solicitor for respondents: *A. B. Sanders, for T. W. Stuchbery, Maidenhead.*

(1) [1903] 1 K. B. 169, at p. 175.

F. O. R.

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April 12.

Pawnbroker—Illegal Pawning—Restitution on Terms—Magistrates' Order—Civil Remedy—Pawnbrokers Act, 1872 (35 & 36 *Vict. c.* 93), *s.* 30.

An agent of the plaintiffs having been convicted by a Court of summary jurisdiction of larceny as a bailee in respect of certain goods of the plaintiffs which he had pawned with the defendant, a pawnbroker, the Court made an order under s. 30, sub-s. 2, of the Pawnbrokers Act, 1872, on the application of the police officer in charge of the case, which application the plaintiffs' representative, though present, neither supported nor opposed, for the return of the goods on payment by the plaintiffs of the amount of the loan. The plaintiffs did not comply with the order, and subsequently sued the defendant in the county court for the return of the goods and obtained judgment:—

Held, that the judgment was right.

Appeal by the defendant from the decision of the deputy-judge of the Greenwich County Court.

An agent of the plaintiffs, who carried on business as manufacturers and vendors of cheap jewellery, was summarily convicted of larceny as a bailee in respect of certain jewellery which had been entrusted to him by the plaintiffs for the purpose of sale, and which he had wrongfully pawned with the defendant, a pawnbroker. After the conviction the police officer in charge of the case applied to the magistrates for an order for the restitution of the jewellery, and the magistrates made an order under s. 30 of the Pawnbrokers Act, 1872 (1), for the defendant to restore the jewellery to the plaintiffs on payment by them to him of the amount for which the jewellery had been pawned. The plaintiffs' representative, who was in court at the time, neither supported nor opposed the application for restitution. The

(1) The Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 30, sub-s. 2: "If any person is convicted in any court of feloniously taking or fraudulently obtaining any goods and chattels, and it appears to the Court that the same have been pawned with a pawnbroker, the Court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the Court, according to the conduct of the owner and the other circumstances of the case, seems just and fitting."

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plaintiffs did not comply with this order, but subsequently brought this action in the county court against the defendant for the return of the jewellery or damages for its detention. The deputy county court judge gave judgment for the plaintiffs. The defendant appealed.

J. R. Atkin, K.C., and *C. L. Attenborough*, for the defendant. The intention of s. 30 of the Pawnbrokers Act, 1872, was to give relief to pawnbrokers in cases where, without any negligence on their part, goods had been illegally pawned, but if the making of an order under this section for restitution on terms is no answer to a civil action by the prosecutor for the return of the goods, it is obvious that this intention will be entirely frustrated, for no prosecutor would ever apply for an order if the circumstances of the case were prejudicial to him. If any effect is to be given to this legislation, an order for restitution must be regarded as a decision between the owner of the goods and the pawnbroker, sufficient to enable the pawnbroker, if subsequently sued by the owner, to succeed on a plea of res judicata: *Midland Ry. Co.* v. *Martin*. (1) In the circumstances of this case, the plaintiffs having stood by and not objected to the making of the order, they are now estopped from claiming the return of the goods except on their compliance with the magistrates' order: *Dover* v. *Child*; (2) *Ex parte Davison*. (3)

George Elliott, for the plaintiffs, was not called upon to argue.

RIDLEY J. The view which I take of this matter is that none of the Acts dealing with the restitution of stolen property were intended by the Legislature to alter the civil rights of the parties as they existed. They were intended, in my opinion, to give to the owner, when the prosecution has resulted in a conviction, a summary remedy by means of an order of the Court before which the conviction has taken place. The intention was to benefit prosecutors by saving them from the necessity of bringing actions for the return of their property; but it was also necessary to safeguard other people's interests, and therefore in the

(1) [1893] 2 Q. B. 172. (2) (1876) 1 Ex. D. 172.
(3) (1896) 60 J. P. 808.

Pawnbrokers Act, 1872, there is to be found a provision that, if the goods have been pawned with a pawnbroker, the Court has a discretion to order the return of the goods only on the terms that the owner do pay to the pawnbroker the whole or part of the loan. The reason why a similar provision is not to be found in s. 100 of the Larceny Act, 1861, probably is that that enactment does not deal specially with pawnbrokers, but is of a general character. But it is the practice in Courts of assize, and, I believe, in Courts of quarter sessions also, not to make an order of restitution in a case where the circumstances require that there should be terms imposed unless the prosecutor consents to compensate the person who has possession of the stolen property.

It was contended on behalf of the defendant that the effect of s. 30 of the Pawnbrokers Act, 1872, is to deprive the owner of the property of the right to pursue his civil remedy for the return of his property, if an order has been made under the section. It is, I think, a sufficient answer to that argument that, if that had been the intention of the Legislature, it would have been so stated in the section. Reliance was also placed on the doctrine of estoppel. I am doubtful whether there would be any estoppel even where an order has been made under the Act on the application of the owner of the goods himself, because, as I have said, I think the intention was to leave to the owner all his civil rights in respect of the recovery of his property; but in a case like the present, where the owner of the goods did not make the application for the order and was no party to it, I fail to see how any estoppel arises at all. I think that the deputy county court judge came to a perfectly right decision, and this appeal must therefore be dismissed.

BRAY J. I am of the same opinion.

Appeal dismissed.

Solicitor for plaintiffs: *Edwin E. Clarke.*
Solicitors for defendant: *Attenborough & Sons.*

F. O. R.

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THE KING *v.* WOODCOCK.

Summary Jurisdiction—Special Case—Application for Service on Justices—Practice—Summary Jurisdiction Rules, 1886, *r.* 18.

Where an application is made under s. 33 of the Summary Jurisdiction Act, 1879, to a Court of summary jurisdiction to state a special case, it is a sufficient compliance with the rule dated March 20, 1906, made in substitution of r. 18 of the Summary Jurisdiction Rules, 1886, if the previous practice of serving a copy of the application on each justice personally is followed instead of leaving the justices' copies with the clerk of the Court.

MANDAMUS to justices of Lancashire.

On September 21, 1906, James Pincock was convicted at the petty sessions held at Wigan of an offence under the Licensing Act, 1872. Immediately upon the conviction his solicitor applied orally to the justices to state a special case, which they then agreed to do subject to the service of formal application in writing. The solicitor accordingly prepared an application in writing addressed to the two justices who had heard the information requesting them to state a special case, and on September 26 he went to the office of the clerk to the justices and left with the assistant clerk a copy of the application addressed to the clerk, and, having obtained from the assistant clerk the addresses of the two justices, he served another copy of the application on each of the said justices personally. In so doing he was acting in accordance with the practice under r. 18 of the Summary Jurisdiction Rules, 1886, which was in force previously to March, 1906. On October 8 the justices refused to state a case, upon the ground that under the new rule dated March 20, 1906, made in substitution of r. 18 of the Summary Jurisdiction Rules, 1886 (1), a copy of the application for each

(1) The rule dated March 20, 1906, made in substitution for r. 18 of the Summary Jurisdiction Rules, 1886, provided as follows: "An application to a Court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing, and shall be left with the clerk of the Court at any time within seven clear days from the date of the proceeding to be questioned, and there shall also be left with him a copy of such application for each of the justices constituting such Court, which shall be duly forwarded by him to each of the said justices."

of the justices constituting the Court is required to be left with the clerk of the Court, and that, as that had not been done, they had no jurisdiction to state a case. Pincock obtained a rule nisi for a mandamus to the justices to state a case.

Compston, for the justices, shewed cause. The cases shew that a literal compliance with the rules is obligatory, and that in the event of non-compliance the justices have no jurisdiction to state a case though they may be willing to do so. In *South Staffordshire Waterworks Co.* v. *Stone* (1) an oral application for a case was made on behalf of the appellants and granted by the justices sitting in Court, and within seven days a written notice of appeal was served by the appellants on the clerk to the justices; but it was held that this was not a sufficient compliance with r. 18 of the Summary Jurisdiction Rules, 1886, which provided that "An application to a Court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing, and a copy left with the clerk of the Court, and may be made at any time within seven clear days from the date of the proceeding to be questioned." In *Westmore* v. *Paine* (2) the appellant, having been convicted by a Court consisting of five justices, at once made oral application for a case, which application was acceded to. He subsequently served two of the five justices, with a formal written application addressed to them only, and the case was stated by the two justices only. On the appeal being called on for hearing before the High Court the respondent was desirous that the appeal should be heard, but the Court held that as the statutory condition had not been fulfilled they had no jurisdiction to hear it. In the present case the statutory formalities had not been duly observed, and the justices were right in holding that they had no jurisdiction.

Avory, K.C., and *Bonsey*, in support of the rule. The object of the new rule was to relieve the appellant of the burden of having to personally serve each of the justices with a copy of the application. Now the appellant has only to take a copy for each of the justices to the office of the clerk, leaving it to him to forward them to the justices. Here the appellant did all

(1) (1887) 19 Q. B. D. 168. (2) [1891] 1 Q. B. 482.

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that was required of him, and also did the clerk's duty in addition.

LORD ALVERSTONE C.J. I think the justices ought to state a case.

DARLING and PHILLIMORE JJ. concurred

Rule absolute.

Solicitors for the justices: *Corbin, Greener & Cook, for T. R. Taylor, Wigan.*

Solicitors for the prosecutor: *Neve, Beck & Kirby.*

J. F. C.

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April 12.

J. H. BILLINGTON, LIMITED *v.* BILLINGTON.

Practice—Security for Costs—Appeal to King's Bench Division from Official Referee—Inherent Jurisdiction of High Court.

On an appeal from an official referee the King's Bench Division has an inherent jurisdiction to order the appellant to give security for costs.

MOTION for security for costs.

The applicants were the plaintiffs in an action against the defendant tried before an official referee in which they had recovered judgment for a sum of money and costs. The official referee had also made a decree for an injunction restraining the defendant from carrying on the business of a lime merchant within a certain area. Since the judgment and decree the defendant had been adjudicated a bankrupt. He subsequently gave notice of appeal to the King's Bench Division from the decree for an injunction. The plaintiffs now moved that the defendant should be ordered to give security for the costs of the appeal.

Hon. M. Macnaghten, for the plaintiffs. If the Court has power to order security to be given, this is a proper case for the exercise of that jurisdiction: *United Telephone Co.* v. *Bassano.* (1) The defendant's appeal is properly brought to this Court, and not to the Court of Appeal: *Wynne-Finch* v. *Chaytor.* (2) It

(1) (1886) 31 Ch. D. 630. (2) [1903] 2 Ch. 475.

may be conceded that there is no statute or rule of the Supreme Court directly authorizing the High Court to order security for costs of an appeal from an official referee; but the Superior Courts of common law and equity had an inherent power to order security to be given in a proper case within their own jurisdiction: *Cowell* v. *Taylor*. (1) Thus a plaintiff residing abroad was formerly required to give security for the costs of the action. This was not done by virtue of any statute or general rule of Court made in pursuance of any statute, but was done of the inherent power of the Court to regulate its own procedure. Originally a foreigner was not ordered to give security for costs, "For it was considered that such a proceeding might have affected trade by excluding foreigners from our Courts; and would be a means of clogging the course of justice": Tidd's Practice, 9th ed. vol. 1, p. 534. The practice came into vogue at the end of the eighteenth century: *Pray* v. *Edie* (2); and then only, as it appears, because English subjects who sued in most of the foreign countries in Europe were under a similar necessity of giving security for costs: see *Fitzgerald* v. *Whitmore*. (3) So also, where an insolvent person sued as a nominal plaintiff for the benefit of somebody else, the Court, of its own inherent jurisdiction, ordered him to give security. If the Court had such a power in these particular cases it must have had the same power in any proper case.

The Court of error had no less power in this respect than the Court of first instance: *Haygarth* v. *Wilkinson*. (4) Before the Judicature Acts there was a difference between the practice of the Court of Chancery and the Court of error. Every appellant in the Court of Chancery had to deposit the sum of 20*l*. That was not the practice in the Courts of common law: there poverty alone was not considered a sufficient reason for requiring security to be given; but if the appellant had become either really or technically insolvent, or was out of the country, security for costs was ordered: *Harlock* v. *Ashberry*.(5) The present practice, both in the High Court and in the Court of Appeal,

(1) (1885) 31 Ch. D. 34.
(2) (1786) 1 T. R. 267.
(3) (1786) 1 T. R. 362.
(4) (1848) 12 Q. B. 851.
(5) (1881) 19 Ch. D 84.

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follows that of the Courts of common law rather than that of the Court of Chancery: *Republic of Costa Rica* v. *Erlanger* (1); *Cowell* v. *Taylor* (2); Order LXV., r. 6. An appeal from an official referee is analogous to an appeal to the Court of Appeal. "The general rule," said Bowen L.J., "is that poverty is no bar to a litigant; that from time immemorial has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another": *Cowell* v. *Taylor*.(3) The appellant in the present case has had the benefit of a decision of the official referee, which is equivalent to a judgment of the High Court, and, his case being analogous to that of an appellant to the Court of Appeal, he ought to give security for costs.

R. M. Montgomery (*Bickmore* with him), for the defendant. In two cases, viz., where the plaintiff resides out of the jurisdiction of the Court and where, being himself in a state of insolvency or extreme poverty, he sues as a nominal plaintiff, the action being really carried on by or for the benefit of another person, the Courts will, on the application of the defendant, stay the proceedings until security be given to the satisfaction of the Master: Lush's Practice, 3rd ed. p. 928. The power of the Superior Courts of common law to order security for costs was confined, and the present power of the King's Bench Division is also confined, to those two cases. In the case of an appeal from a county court or other inferior Court it is specially provided by Order LIX., r. 17, that the rules applicable to an appeal to the Court of Appeal shall apply. So far as security for costs is concerned, that rule would have been unnecessary if the power to order security had been inherent in the High Court. But, whether that power was or was not inherent in the superior Courts of law and equity, the practice of the Supreme Court is now regulated by the Rules of the Supreme Court; if it had been intended that in a case like the present the King's Bench Division should have

(1) (1876) 3 Ch. D. 62. (2) 31 Ch. D. 34.
(3) 31 Ch. D. 34, at p. 38.

power to order security for costs, that power would have been expressly conferred by Order XL., which deals with judgments entered by referees and motions to set aside judgments so entered; but no mention is there made of any such powers. This is not a case of an appellant dragging his opponent from one Court to another. The case has remained from first to last in the same Court. There is no analogy between the present appeal and an appeal to the Court of Appeal; a truer analogy would be the case where before the Judicature (Procedure) Act, 1894, in matters of practice and procedure, an appeal lay from a judge in chambers to a Divisional Court. It was never the practice to order security for costs to be given on such appeals.

Hon. M. Macnaghten, in reply.

LORD ALVERSTONE C.J. I have always understood that the power of the Superior Courts of common law to order security for costs arose from the inherent jurisdiction of those Courts over their own procedure. It is true that security was as a rule ordered only in a few exceptional cases which were subject to special considerations—for example, where the action was brought by a foreigner or merely nominal plaintiff, where it was obviously unjust that the action should be allowed to proceed unless payment of the costs were secured; but I am not aware of any statute conferring this power upon the Courts of common law. The cases I have mentioned are instances in which the power of the Superior Courts of common law has been in fact recognized, but I take it that the three Superior Courts had theoretically the power to order security to be given in all cases where they thought it just to do so. Their practice in exceptional cases is proof of their general jurisdiction. Then the Judicature Acts, and the orders of the Supreme Court made under them, recognize the power to order security for costs. It is stated by Malins V.-C. in *Republic of Costa Rica* v. *Erlanger* (1) that "the rule at common law was different from the rule of the Court of Chancery. In the Courts of common law it was substantial security, according to the nature of the case, and given from time to time; while in the Court of Chancery it was an arbitrary

(1) 3 Ch. D. 62, at p. 65.

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Lord Alverstone C.J.

rule which under no circumstances was departed from." The Vice-Chancellor is there dealing with the case of a foreign plaintiff resident abroad, one of the instances in which security for costs used to be ordered by the old Courts of common law, and he speaks of the practice in a way which implies that it arose from the inherent jurisdiction of those Courts.

Now the power of the Court to send a case for trial before an official referee is a creation of the Judicature Acts and the rules and orders made under them, and it has been urged by counsel for the defendant that in appeals from the county court to the High Court power is expressly conferred by statute to order security for costs, and that one would expect to find a similar power in Order XL. or elsewhere among the Rules of the Supreme Court, if it was really intended that the High Court should have such a power in the case of appeals from an official referee: but that argument loses its force if the power of the Superior Courts of common law to order security was an inherent power and not conferred merely by statute; it only comes to this, that there is no special power by statute or the Rules of the Court to order security. But all the powers of the old Courts of common law are transferred to the High Court, and consequently appeals from official referees which come before the King's Bench Division come to a Court having inherent power to order security for costs.

It has been ingeniously argued that proceedings before an official referee are merely a preliminary step in the proceedings analogous to proceedings before a Master or a judge in chambers. If that were the true view, there might be much force in this contention; the Court to which such an appeal lies would be slow to order security for costs on an appeal from a Master or a judge in chambers, and would only do so in a very exceptional case. But I cannot regard an appeal from an official referee as analogous to an appeal from chambers. If the decision of the official referee stands, it is a final judgment. In the present case the judgment is for a sum of money to be paid with costs and for an injunction. The present appeal is therefore an appeal, not from an interlocutory order, but from a final judgment, and if it be true, as claimed by counsel for the defendant,

that a party to an action is entitled, in the absence of a statutory provision to the contrary, to one appearance in the High Court without being obliged to give security for costs, the answer to his contention is that he has already had the advantage of such an appearance. I am therefore of opinion that this Court has power to order security for costs to be given, and in the circumstances of this case I think that 25*l.* should be paid into Court within fourteen days.

DARLING J. I concur, and have nothing to add.

PHILLIMORE J. I agree, and only desire to add this: The jurisdiction of the Court of Appeal, and the power of that Court to impose conditions before it hears an appeal, is regulated by the Judicature Acts and the Rules of Court made under those Acts, and therefore it was probably necessary that a special power should be conferred upon that Court to enable it to order security for costs to be given before it would enter upon the appeal. But there has descended upon the High Court the inherent power of the old Courts of common law to regulate their domestic jurisdiction, and therefore while a case remains in the High Court this power may be exercised without any special provision enabling the Court in this behalf. Instances of the exercise of this power have grown up from time to time pro re nata as the Court has thought proper; for example, in the case where the plaintiff is a foreigner the Court has ordered security for costs to be given without any statutory power being conferred upon it. I therefore agree that in an appeal from an official referee to this Court the Court has power to order the appellant to give security for costs, and I think, further, that in this case the order ought to be made.

Order as prayed.

Solicitors for plaintiffs: *Cunliffes & Davenport.*
Solicitors for defendant: *Busk, Mellor & Norris.*

W. H. G.

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April 10.

MARSHALL *v.* GRAHAM.
BELL *v.* GRAHAM.

Elementary Education—Attendance at School—Ascension Day—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *ss.* 7, 74.

Ascension Day is a "day exclusively set apart for religious observance by the religious body" known as the Church of England, within the meaning of ss. 7 and 74 of the Elementary Education Act, 1870.

Two cases stated by justices for the West Riding of Yorkshire.

MARSHALL *v.* GRAHAM.

An information was preferred by Thomas Graham, a person appointed to carry out the compulsory by-laws of the Ardsley and Darfield District Education Sub-committee of the West Riding County Council, against the appellant, for that he, being the parent of a child named John Marshall, being not less than five nor more than fourteen years of age, neglected to cause such child to attend school without lawful excuse for the whole time required by the by-laws made by the said county council as the education authority under Part III. of the Education Act, 1902.

At the hearing, which took place on July 4, 1906, the following facts were admitted:—

The Darfield Mixed School is, and since April 1, 1904, has been, a non-provided public elementary school within the meaning of the Education Acts, 1870 to 1902, conducted in connection with, and, so far as religious instruction is concerned, according to the principles of, the Church of England. It is situate within the area for which the county council of the West Riding of Yorkshire is the local education authority. Darfield Mixed School is the school selected for the said John Marshall, and is and has been attended by him for some time. John Marshall is aged about eleven and a half years. The appellant is the parent of John Marshall.

The said by-laws, made May 25, 1905, by the said county council and duly sanctioned by the Board of Education, provided (amongst other things) as follows:—

2. "The parent of every child of not less than five nor more

than fourteen years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance."

3. "The time-table during which every child shall attend school shall be the whole time for which the school selected shall be open for the instruction of children of similar age."

4. "Provided that nothing in these by-laws . . . .

"(*b*) Shall require any child to attend school on any day exclusively set apart for religious observance by the religious body to which its parent belongs."

6. "Every parent who shall not observe or shall neglect or violate these by-laws or any of them shall upon conviction be liable to a penalty not exceeding with costs twenty shillings for each offence."

On May 24, 1906, the said school was open for the instruction of children of eleven and a half years of age both in the morning and in the afternoon. On May 24, 1906, being Ascension Day, the said John Marshall was wholly absent from school in the morning. The appellant stated that it was by his desire and direction that the said John Marshall did not attend school on the morning of that day, and that in accordance with such desire and direction he attended church in the morning and went to school in the afternoon.

The appellant belongs to the religious body of the Church of England. No evidence was adduced that Ascension Day was or is in practice treated by the Church of England as a day exclusively set apart for religious observance. It was contended on behalf of the appellant that he was entitled, in accordance with by-law 4, to keep his child away from school on Ascension Day, inasmuch as that day was exclusively set apart for religious observance by the religious body (namely, the Church of England) to which he belonged, and in support of that contention he cited the statute 5 & 6 Edw. 6, c. 3, s. 1, and the 13th Canon of 1603.

For the respondent it was contended that the statute 5 & 6 Edw. 6, c. 3, was not an ordinance of a religious body, but a public general statute equally binding on all subjects of the realm, and that therefore the days named in the statute, including Ascension Day, could not be said to be set apart for religious

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observance by a religious body; and that, even if they were, there was nothing to shew that Ascension Day was "exclusively" so set apart.

The justices held that May 24, 1906, was not a day exclusively set apart for religious observance by the religious body to which the appellant belonged in the sense contemplated by the by-laws and the provisions of the Elementary Education Act, and that the appellant neglected on the said day to cause his child to attend school without lawful excuse, and they accordingly convicted the appellant.

BELL *v.* GRAHAM.

An information was preferred under the same by-laws as in the former case against the appellant James Bell for having neglected to cause his child Mary Ann Bell to attend school without lawful excuse during the whole time required by the said by-laws.

At the hearing the following facts were proved or admitted:—

Low Valley School, which is the school selected for Mary Ann Bell, is a non-provided public elementary school conducted according to the principles of the Church of England. It is situate within the area for which the county council of the West Riding of Yorkshire is the local education authority. Mary Ann Bell is aged about nine years, and is the child of the appellant. On May 24, 1906, the said school was open for instruction of children of nine years of age both in the morning and in the afternoon. On the said May 24, being Ascension Day, Mary Ann Bell was wholly absent from school both morning and afternoon. The appellant stated in evidence that he was a member of the Church of England, and that it was by his desire and direction that Mary Ann Bell did not attend school on that day, and that in accordance with his direction she attended church in the morning and stayed at home the rest of the day. The appellant had since the year 1895 attended church on two occasions only, one of such occasions being his wedding in 1897, and the other occasion a funeral in 1903. He had been baptized and confirmed. Previously to 1895 he had attended church regularly every Sunday. It was not proved that he had ever been a communicant or had ever attended the communion of the

Church of England, or that he attended any other place of worship than the Church of England or was an adherent of any dissenting body. He also admitted that he did not know what place of worship his children attended, and that it might be the Wesleyan Chapel, but said that it was his wish that they should go to church on Ascension day. The same contentions were urged as in the case of *Marshall* v. *Graham*.

The justices held that May 24, 1906, was not a day exclusively set apart for religious observance by the Church of England, and also that they were not satisfied upon the evidence that the appellant was a member of that religious body. They accordingly convicted the appellant of having neglected to cause his child to attend school without reasonable excuse.

Lord Robert Cecil, K.C., and *Montagu Barlow*, for the appellants. Under these by-laws, which follow the language of s. 74 of the Elementary Education Act, 1870, two questions arise—first, whether Ascension Day is a day exclusively set apart for religious observance by the religious body to which the appellants belong; and secondly, if it is not, whether the attendance of a child at church on that day may not be a reasonable excuse for his non-attendance at school.

The Church of England has observed Ascension Day as a holy day from very early times. In Bingham's Antiquities of the Christian Church, vol. 7, p. 126, it is said: "The observation of this festival was so ancient that St. Austin could derive its original from no other fountain, but either apostolical institution or the general agreement of the Church in some plenary council. . . . . It is certain therefore the feast of the Ascension was generally observed all over the Church long before St. Austin's time." And Wheatley, in his work on the Book of Common Prayer, at p. 161, speaking of the antiquity of the Christian festivals, says: "We find that in the very infancy of Christianity some certain days were yearly set apart to commemorate the *resurrection* and *ascension* of Christ, the *coming of the Holy Ghost*, &c., and to glorify God by an humble and grateful acknowledgment of these mercies granted to them at those times. Which laudable and religious custom so soon

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prevailed over the universal Church, that in five hundred years after our Saviour we meet with them distinguished by the same names we now call them by; such as *Epiphany*, *Ascension Day*, *Whit-Sunday* &c., and appointed to be observed on those days on which the Church of England now observes them." The setting apart of Ascension Day as a holy day is expressly recognized by the statute of 5 & 6 Edw. 6, c. 3, which, after reciting in s. 1 that "Men be not so mindful to laud and praise God, so ready to resort and hear God's holy word, and to come to the holy communion and other laudable rites, which are to be observed in every Christian congregation, as their bounden duty doth require," and that "it hath been wholesomely provided that there should be some certain times and days appointed wherein the Christian should cease from all other kind of labours, and should apply themselves only and wholly to the aforesaid holy works properly pertaining unto true religion," and that "the times appointed specially for the same are called holy days; not for the matter and nature either of the time or day, nor for any of the saints' sake, whose memories are had on those days (for so all days and times considered are God's creatures, and all of like holiness), but for the nature and condition of those godly and holy works, wherewith only God is to be honoured, and the congregation to be edified, whereunto such times and days are sanctified and hallowed; this is to say, separated from all profane uses, and dedicated and appointed not unto any saint or creature, but only unto God and his true worship," proceeds to enact "that all the days hereafter mentioned shall be kept and commanded to be kept holy days, and none other; that is to say all Sundays in the year, the days of the feast . . . . of the Ascension of our Lord Jesus Christ" and twenty-six other festivals therein specified, "and that none other day shall be kept and commanded to be kept holy day or to abstain from lawful bodily labour"; and the Act of Uniformity of 1558 (1 Eliz. c. 2), s. 14, adds to the punishment of ecclesiastical censure for the offence of neglecting to attend church on the said holy days a pecuniary penalty of twelve pence for every such offence to be levied by way of distress. The said Act of Edward VI. is still in force as regards professed members of the Church of England except so far as

the enforcement of any penalty is concerned: *Taylor* v. *Timson*. (1) The Act of 9 & 10 Vict. c. 59 repeals it only "so far as the same affects persons dissenting from the worship or doctrines of the United Church of England and Ireland and usually attending some place of worship other than the Established Church; provided always that no pecuniary penalty shall be imposed upon any person by reason of his so absenting himself as aforesaid." The effect of those statutes is to impose a duty on all members of the Church of England to attend church on those days in preference to doing other work. "Any person, be he who he may, who is not a dissenter from the Church of England, is liable to ecclesiastical censure if he does not go to church, and ecclesiastical censure, although he is not to be fined, would operate as a fine, for he might be admonished to go to church, and would be liable to pay the costs of the proceeding": per Stephen J., *Taylor* v. *Timson*. (2) The Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35), s. 2, treats Ascension Day as a holy day of special importance; it places it in the same category as Sunday, Christmas Day, Ash Wednesday and Good Friday, and provides that on those four days and on Ascension Day the shortened form of morning and evening prayer specified in the schedule to the Act is not to be used. But apart from the statutory obligation to attend church on holy days the same duty is enjoined by the Canons of 1603. Canon 13 provides that "All manner of persons within the Church of England shall from henceforth celebrate and keep the Lord's Day, commonly called Sunday, and other holy days, according to God's holy will and pleasure, and the orders of the Church of England prescribed in that behalf; that is in hearing the word of God read and taught; in private and public prayers; in acknowledging their offences to God and amendment of the same; in reconciling themselves charitably to their neighbours where displeasure hath been; in oftentimes receiving the Communion of the body and blood of Christ; in visiting the poor and sick; using all godly and sober conversation." Canon 64 provides that "Every parson, vicar or curate shall in his several charge declare to the people every Sunday at the time appointed in the

(1) (1888) 20 Q. B. D. 671. (2) Ibid. at p. 682.

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Communion-book whether there be any holy days or fasting days the week following." And by Canon 90 the churchwardens and sidesmen of each parish are to "diligently see that all the parishioners duly resort to their church upon all Sundays and holy days, and there continue the whole time of divine service." A like ordinance is to be found in Injunction 24 of the Injunctions of Edward VI., A.D. 1547: "Like as the people be commonly occupied on the work day with bodily labour for their bodily sustenance, so was the holy day at the first beginning godly instituted and ordained that the people should that day give themselves wholly to God. And whereas in our time God is more offended than pleased, more dishonoured than honoured upon the holy day . . . . therefore all the King's faithful and loving subjects shall henceforth celebrate and keep their holy day according to God's holy will and pleasure; that is in hearing the word of God read and taught" (and so on in the same terms as are afterwards reproduced in Canon 13 cited above) . . . . "Yet notwithstanding all parsons, vicars and curates shall teach and declare unto their parishioners that they may with a safe and quiet conscience in the time of harvest labour upon the holy and festival days and save that thing which God hath sent."

The word "exclusively" in s. 74 of the Elementary Education Act, and in the by-laws made thereunder, does not mean that the whole day must be devoted to religious observance. There is no day which, according to the tenets either of the Church of England or of the Roman Catholic Church, is set apart for religious observance during the whole twenty-four hours. All that is meant is that religious observance is the primary duty of the members of the church on the recognized holy days, and that everything is to be excluded which is inconsistent with it.

In both the cases appealed, therefore, if the appellant was a member of the Church of England, the fact that the day on which his child failed to attend school was Ascension Day afforded a good defence to the information. In Marshall's case there was a further defence that, whether Ascension Day is a day so set apart or not, the desire of the parent that the child should attend church afforded a reasonable excuse for his not being at school in the morning. Sect. 74 of the Elementary Education Act, 1870,

specifies three reasons which shall be reasonable excuses for the child's non-attendance at school, but those three reasons are not exhaustive. In Bell's case it may be that the defence of reasonable excuse would not be open, for there the child was absent from school in the afternoon as well as in the morning, and it was admitted she was not at church in the afternoon, but that was not one of the grounds upon which the conviction proceeded.

Danckwerts, K.C., and *Latter*, for the respondent. Ascension Day is not exclusively set apart for religious observance. The word "exclusively" must mean to the exclusion of everything but religious observance. It is admitted that no day is in that sense exclusively set apart by the Church of England, and therefore that particular exemption was not intended to apply to members of the Church of England. It was meant to meet the case of certain other religious bodies, such as the Jews, which on particular days, such as the Day of Atonement and New Year's Day, do enjoin on their members religious exercises during the whole day. That it does not apply to the English Church was the view of Sir Hugh Owen, who in his Education Acts Manual, 20th ed. at p. 208, says: "The latter part of the sub-section was specially intended to meet the cases of Jewish and Roman Catholic children." Even if the word "exclusively" is not interpreted to mean during the whole twenty-four hours, it must at least mean the whole day to which the Education Acts apply, that is to say, the school hours. But even in this more limited sense it would prevent the application of the exemption to members of the Church of England. Secondly, Ascension Day is not set apart by the religious body to which the appellants belong. The Church of England has never set apart any such holy days. It may be that days have been so set apart by statute, but a statutory setting apart is not a setting apart by a religious body. Therefore the appellants cannot rely upon the 5 & 6 Edw. 6, c. 3, as affording a defence. It is to be observed that there are twenty-six other holy days mentioned in this statute in addition to Ascension Day; and if a parent is to be at liberty to withdraw his child from school on all such days, a general exercise by parents of that liberty would completely dislocate the educational organization. Nor can they rely on the

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Canons of 1603, for those Canons, in so far as they introduce any new matter and are not merely declaratory of the ancient usage and law of the Church, are not binding on the laity: per Lord Hardwicke, *Middleton* v. *Crofts* (1); per Blackburn J., *Bishop of Exeter* v. *Marshall* (2), and per Willes J. (3) Nor can they rely on the Injunctions of Edward VI. The word "holy day" in Injunction 24 is in the singular, and therefore presumably was not intended to apply to any day but Sunday. Bishop Burnet, in his History of the Reformation (Oxford ed. 1865), vol. 2, p. 76, speaking of this Injunction says: "The article about the strict observance of the holy day seemed a little doubtful; whether by the holy day was to be understood only the Lord's-day, or that and all other church festivals. The naming it singularly the holy day, and in the end of that article adding festival days to the holy day seemed to favour their opinion that thought this strict observance of the holy day was particularly intended for the Lord's-day, and not for the other festivals." The defence of reasonable excuse is not open to the appellants, for attendance at church cannot be a reasonable excuse for non-attendance at school unless the church and school hours clash, and there was no evidence to shew that they did so, even in Marshall's case. There may have been an early service which the child might have attended before the school hours began. The question whether there was a reasonable excuse is one of fact, not of law: per Grove J., *Belper School Attendance Committee* v. *Bailey* (4); and the justices, having convicted, must be taken to have found the fact against the appellants [He also referred to *London School Board* v. *Duggan* (5) and *Hewett* v. *Thompson.* (6)]

Lord Robert Cecil, K.C., in reply. The words "set apart for religious observance" mean consecrated to God and "separated from all profane uses." They do not mean that the observance is to take place in a church throughout the day. Religious observance may exist in the home, in the person's conduct and conversation. The word "exclusively" admittedly adds nothing to

(1) (1736) 2 Atk. 650, at p. 653.
(2) (1867) L. R. 3 H. L. 17, at p. 34.
(3) Ibid. at pp. 42, 43.
(4) (1882) 9 Q. B. D. 259.
(5) (1884) 13 Q. B. D. 176.
(6) (1889) 60 L. T. 268.

the definition, except so far as it means "specially, primarily." As to the point that the holy days were not set apart by the religious body, it is enough to say that if there is any organized body authorized to speak for the Church it is Convocation, and any declaration by that body is binding on the members of the Church in foro conscientiæ. The Canons are such declarations. The Act of Edward VI. merely gives statutory effect to what had long been the law of the Church; it recites the holy days by name and restricts their number, providing that no days other than those specified shall be kept holy.

LORD ALVERSTONE C.J. In this case two parents were summoned for not sending their children to school on Ascension Day. In the case of Marshall, which I propose to deal with first, it appears that the boy, by the desire and direction of his father, who belongs to the religious body of the Church of England, attended church instead of going to school in the morning of Ascension Day, but went to school as usual in the afternoon of that day; and the question which we have to decide is whether a father who, being a member of the Church of England, thinks it right to send his boy to church on Ascension Day is entitled to keep him from school for that purpose. The question turns upon the meaning of certain words which occur in two sections of the Elementary Education Act, 1870, and which are reproduced in the by-laws under which the appellants were convicted. The first of those sections is s. 7, which, by sub-s. 1, provides that "It shall not be required as a condition of any child being admitted into or continuing in the school . . . . that he shall, if withdrawn by his parent, attend the school on any day exclusively set apart for religious observance by the religious body to which his parent belongs." The other section is s. 74, under which the education authority are empowered to make by-laws, and which provides that "no such by-law shall prevent the withdrawal of any child from any religious observance or instruction in religious subjects, or shall require any child to attend school on any day exclusively set apart for religious observance by the religious body to which his parent belongs." The question is whether Ascension Day is so exclusively set apart by the

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Church of England, and whether the Church of England is a religious body within the meaning of that section. It was pressed upon us by Mr. Danckwerts in the first place that the words in question afford no protection unless the day be exclusively set apart in the literal sense of that term—that is to say, unless the whole twenty-four hours, or at all events the whole of the school hours, be so set apart, and that as there is no day which in the Church of England is set apart for religious observance to that extent, the exemption does not apply to members of the Church of England at all. It was said that it was intended only to meet the case of Jewish and Roman Catholic children, and a note in Owen's Education Acts Manual was referred to in support of that view. I do not myself think that there is any foundation for that contention. Mr. Danckwerts, when pressed, could only mention one day, or at the most two days, which are exclusively set apart, in the sense for which he contended, by the Jewish community, and even as to those he produced no authority for his statement; and as to the Roman Catholic Church, I certainly know of no day which it sets apart in that sense. I cannot, therefore, construe the word "exclusively" as meaning that during the whole of the twenty-four hours, or even during the whole of the school hours, there must be some religious observance going on which is inconsistent with the child being at school. It would be a most unfortunate construction to put upon the words, and one which would certainly not promote the harmonious working of the Act. I myself am inclined to think that the word "exclusively" was inserted only for the purpose of preventing ordinary directions as to religious practices upon many days of the year being used as an excuse for not sending a child to school. We certainly ought not to give any such meaning to it as would prevent the exemption from applying to Christmas Day, Good Friday, and other well-known sacred days, days which are consecrated to God in the sense that religious observance upon them is to be a primary duty of members of the Church.

It was secondly contended that, even if Ascension Day is exclusively set apart for religious observance among members of the Church of England, it is not so set apart by the religious

body of the Church itself. It was said that the obligation to keep this and other saints' days holy is imposed by statute alone, and that a setting apart by statute is not a setting apart by the Church. This contention, however, is wholly opposed to what is known of the history of the Church. The authorities of the Church had long before the statute of Edward VI. prescribed a certain number of days on which the people were to devote themselves to prayer and religious observance. The statute of Edward VI. no doubt recognized the existence of those days as being "sanctified and hallowed, separated from all profane uses, dedicated and appointed not unto any saint or creature, but only unto God and His true worship," and at the same time it reduced the number of such days, a larger number having been originally prescribed by the Church, but it did not for the first time set those days apart as holy days.

In my opinion when Parliament enacted ss. 7 and 74 of the Elementary Education Act, 1870, they meant to protect the consciences of those who believe that they ought to observe these saints' days and keep them sanctified, and to enable such persons to withdraw their children from school on those days. I therefore come to the conclusion that Ascension Day is a day "exclusively set apart for religious observance by the religious body" to which these appellants belong.

We were told that as there were twenty-seven holy days specified in the Act of Edward IV., the effect of our so holding would be to disorganize the educational system. I may observe that, as was pointed out in the course of argument, that objection is largely cut down by the fact that many of those days occur in what are known to be school holidays, but I do not in any way rely upon that. I do not stop to consider how many such days there may be, for I do not think that we ought to allow any consideration of their number to prevent us from giving effect to the obvious intention of Parliament to respect and protect the consciences of religious-minded people.

I only wish to say a very few words with regard to the other points in the case. Speaking of Marshall's case, if I had not taken the view which I have, I should certainly have come to the conclusion that there was a "reasonable excuse" under by-law 2,

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and that we ought so to hold. Mr. Danckwerts said that the point had never been taken in the Court below, and that the question of reasonable excuse was one of fact for the justices. But upon the facts as stated—and it is not suggested that any additional evidence could materially alter those facts—it seems impossible to say that, so far as Marshall is concerned, there was not a reasonable excuse. In Bell's case, also, the judgment which I have already delivered entitles the appellant to succeed. But I must point out that, if I had not taken the view which I have expressed as to the meaning of the words "exclusively set apart," I should have had a difficulty in saying that there was any reasonable excuse in his case, for the child did not go to church in the afternoon, but stayed at home.

The other finding of the justices upon which the conviction in Bell's case was based is to my mind a very extraordinary one. We have not heard any argument from Mr. Danckwerts upon it. The man said he was a member of the Church of England; he had been baptized and confirmed according to the rites of that Church. He had previously to his marriage attended church regularly. Since 1895 he had only attended twice, once on his wedding day and once on the occasion of a funeral. Upon this evidence the justices said that they were not satisfied that the appellant bona fide belonged to the Church of England. I think it would be very improper to hold that, because a man had been irregular in his attendance at church, he did not honestly belong to the religious body of which he claimed to be a member. I think that in both these cases the appeals must be allowed.

DARLING J. I am of the same opinion. To my mind the words "exclusively set apart for religious observance" do not mean that all other things than religious practice should be excluded on the days indicated as holy days, but only that such things should be excluded as the rules of the particular religious body require to be excluded, and for as long a time as those rules require. The words "set apart" would in my opinion suffice, and the phrase "exclusively set apart" is merely an instance of emphasis in the not uncommon guise of repetition. Mr. Danckwerts contended that every moment of the twenty-four hours

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must be given up to religious observance before anyone can take the benefit of the exemption under this Act; yet he could only suggest a single instance of a case to which the exemption might apply, that of the Jewish community. But, if that were so, I cannot imagine why they were not expressly mentioned by name, instead of in this obscure, roundabout fashion. I have come to the conclusion that Ascension Day is a day set apart by the religious body called the Church of England, and that it is so none the less because it is also set apart by one of the statutes of the realm, and that consequently these appellants were entitled to the exemption which they claimed. I am forced to that conclusion upon simply reading the Act of 1870, itself. In one of the Houses of Parliament by which that Act was passed sit the bishops of the Church of England, and I have never heard the accusation brought against them that they are absolutely indifferent to the rights of the Church of England, though they would take good care to safeguard the members of the Jewish or Roman Catholic faith, the two bodies mentioned by Mr. Danckwerts as being those to which alone the exemption was intended to apply.

Then in addition to the exemption under by-law 4 there is also the exemption under by-law 2, which provides that a parent shall not be required to cause his child to attend school if there be a reasonable excuse for non-attendance. Now here is a man who is summoned for not sending his child to school on Ascension Day. Ascension Day being what it is, and the man being a member of the Church of England and desiring that the child should go to church on that day, he sent his child to church. Can anyone say that the desire of that man, whatever his creed may be, that his child should attend the religious service of the body to which he belongs is not a reasonable excuse for withdrawing his child from school, or that the time of the magistracy is properly taken up with the prosecution of such a man for preferring to observe the rites of the religion in which he has been brought up, instead of sending the child to receive purely secular instruction?

PHILLIMORE J. I am of the same opinion. With regard to the interpretation of the word "exclusively" I have nothing to add

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to what has been said by my Lord. But I wish to say a few words with respect to the argument of counsel for the respondent that the Church of England is not a body which has set apart any day for religious observance. That argument seems to me to be in part based upon a misapprehension of what the Catholic doctrine, whether Roman or Anglican, is as to religious observance. It is in part based upon an erroneous view of what establishment by law means. A Church which is established is not thereby made a department of the State. The process of establishment means that the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions. As a branch of the contention that the Church of England is not a religious body which has decreed any religious observance, it was at one time suggested by counsel for the respondent that the Church of England was a new creation beginning at some undefined period, which he did not specify, but which in general terms is called the Reformation. I do not propose to touch on the theology or the history of the matter. We are sitting in a Court of law, and I propose to confine myself entirely to legal considerations. I say that the accepted legal doctrine is that the Church of England is a continuous body from its earliest establishment in Saxon times. The very passage cited from Lord Hardwicke's judgment in *Middleton* v. *Crofts* (1) shews that the Court then accepted the continuity of the Church, for it was said that the Canons of 1603 might be enforced so far as they were declaratory of the established canon law before the Act of Submission of the clergy. Again, when the Bishop of Lincoln was tried before the Archbishop of Canterbury—see *Read* v. *Bishop of Lincoln* (2)—and objection was taken to the archbishop's jurisdiction, the objection was met by saying that Bishop Watson had been so tried in the reign of Queen Anne, and when we came to look at the report of that trial it was found that the bishop raised the same point that the archbishop could not try him, and Holt C.J. referred to precedents in Saxon times as conclusive of the matter. There was no post-reformation law or practice about the trial of a

(1) 2 Atk. 650, at p. 653. (2) (1889) 14 P. D. 88

bishop by an archbishop. In order to get the fact that a bishop could be so tried you had to go back to Saxon times and assume the continuity of the Church from that time. Those who wish to find an index to this legal doctrine will find it in a portion of Sir Robert Phillimore's judgment in *Martin* v. *Mackonochie* (1), which he devotes to the identity in law of the Church of England before and after the Reformation, and, long as that portion of that judgment is, it is by no means exhaustive of the argument.

Assuming then the continuity of the Church, and that it has a power of decreeing religious observances, I come to inquire whether it has decreed anything with regard to Ascension Day. Not to go into the matter at great length, I find the Canon of the Convocation of Canterbury passed under Archbishop Simon Islip in 1362, which codified the practice with regard to the observance of saints' days at that period, including all those saints' days which we find in the later statute and in our Book of Common Prayer, and also some others. The only addition which, as far as I know, was made to that list was made by a Canon of Convocation in 1415 under Archbishop Chicheley, when the day of our patron saint, Saint George, was added to the number of days of obligation; and we find in the Act of 5 & 6 Edw. 6, c. 3, that, though it ceases to be a day of general obligation, the liberty of celebrating it as a festival is preserved to the Order of Knights of the Garter. That being the state of the law previously to the Act of Edward VI., and the Act of Submission of Henry VIII. having provided that all canons then in use which were not contrary to the prerogative royal or common law should remain in force till further order had been taken, which order never was taken, that Canon of 1362 would remain as a binding canon with regard to this matter to this day. Then come the various Prayer Books, the first of Edward VI., the Second of Edward VI., and then the Canons of 1603, and then comes the final Prayer Book of Charles II., all declaring the mind of the Church with regard to the observance of those saints' days which are specified in the Prayer Book. Side by side with these come the enforcing Acts of Parliament, the 27 Hen. 6, c. 5, which prohibited the holding of fairs and

(1) (1868) L. R. 2 A. & E. 116.

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markets on certain high and principal feasts; and, lastly, the 5 & 6 Edw. 6, c. 3, in which the number of saints' days is to some extent reduced and Convocation is forbidden by the secular power to add to the number of saints' days which it was pleased to say should be observed; not that the secular power decreed their observance, but it was pleased to permit the Church to decree their observance, and it was pleased to afford certain civil sanction to that observance. Now Ascension Day is named in all those Canons, Prayer Books, and Statutes. It was declared by the Church to be a holy day at least as early as 1362, probably much earlier, and it has been continued in every one of the declarations of the Church ever since, and has been accepted by Parliament as a day which the Church has lawfully set apart for religious observance. On these grounds I agree that Ascension Day was a day on which the parent could lawfully withdraw his child from school.

With regard to the other defence urged on behalf of the appellants that they had a reasonable excuse for neglecting to cause their children to attend school, I also agree with the appellants' contention on that point. Of the three cases cited—*Belper School Attendance Committee* v. *Bailey* (1), *London School Board* v. *Duggan* (2), and *Hewett* v. *Thompson* (3)—the two last shew clearly that the question is one of law, or may be one of law, for this Court, notwithstanding the decision of the justices. In my opinion, if the justices here had discussed this point and had come to any other conclusion than that this was a reasonable excuse, it would have been a conclusion which this Court would be bound to set aside.

I will only add one word more. There is to my mind a third matter which the justices ought to consider when it is sought to convict a parent of infringement of the by-laws under such circumstances as the present. I do not think that "reasonable excuse" is the right description to give of the defence for a child's absence from school that he was obliged by law to be elsewhere during the school hours. For instance, if the child's absence was due to his having to attend on a subpœna before a Court of law, the ground

(1) 9 Q. B. D. 259. (2) 13 Q. B. D. 176.
(3) 60 L. T. 268.

of his absence could not be properly described as a "reasonable excuse." The word "excuse" implies that what is excused is prima facie unlawful, but there is prima facie nothing unlawful in the child's absence in the case put. So here I incline to think that, apart from any question of reasonable excuse, it is a sufficient answer for the child to say, "As I am not a nonconformist, and consequently am not within the protection of the statute 9 & 10 Vict. c. 59, I cannot obey this by-law because I am bound to obey another Act of Parliament, 5 & 6 Edw. 6, c. 3, which requires me to attend church," for the latter Act is kept in force by the 9 & 10 Vict. c. 59, subject only to this limitation, that no pecuniary penalty is any longer to be imposed for disobedience. I agree that the appeal should be allowed, and I am very glad to be able to do so, because it seems to me that the cause of civil and religious liberty would suffer much if the judgment were otherwise.

Judgment for the appellants.

Solicitors for appellants: *Crawley, Arnold & Co., for J. Hewitt, Barnsley.*

Solicitors for respondent: *Clements, Williams & Co., for J. C. McGrath, Wakefield.*

J. F. C.

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April 12.

HERNE BAY URBAN DISTRICT COUNCIL, Appellants *v.* PAYNE and WOOD and Others, Respondents.

Local Government—Public Health Acts—Private Street Works—Provisional Apportionment—Premises fronting, adjoining, or abutting on Street—Lands extra commercium—Private Street Works Act, 1892 (55 & 56 *Vict.* c. 57), *s.* 6.

A provisional apportionment of the estimated expenses of private street works made under s. 6 of the Private Street Works Act, 1892, is defective and may be successfully objected to under s. 7 of the Act if it does not include all the premises fronting, adjoining, or abutting on the street the subject of the private street works, irrespective of the question how much, if anything, is ultimately charged upon some of the premises.

Lands acquired by an urban authority under s. 164 of the Public Health Act, 1875, to be used as public walks or pleasure grounds are not extra commercium. The urban authority is the "owner" of such lands within the meaning of the Public Health Acts.

Case stated by justices of the peace for the county of Kent.

On January 17, 1906, the Herne Bay Urban District Council, the appellants, resolved with respect to a street in their district known as to several portions thereof as Beacon Hill and Beacon Hill Parade to execute certain works therein, being private street works as defined by the Private Street Works Act, 1892, and their surveyor duly prepared a specification of the works with plans and sections and an estimate of the probable expense and a provisional apportionment as required by the said Act. The resolution was duly published and the specification, plans, sections, estimate, and apportionment were duly deposited. Within one month from the publication of the resolution George Adney Payne, F. A. Wood, Harry Farley, and Charles Thomas Smith, the respondents, as the owners of premises abutting upon the said street, by written notice served upon the appellants, objected to their proposals upon the ground that land the property of the appellants and abutting upon the said street ought to be inserted in the said provisional apportionment.

The objection of the respondents was heard by the justices sitting as a Court of summary jurisdiction on September 1, 1906.

It was admitted or proved before the justices that the new

street in question had buildings on the south side only; that the land on the north or sea side of the said new street, known as the East Cliff, belonged to the appellants and was purchased by them under s. 164 of the Public Health Act, 1875 (1), for the purpose of a public pleasure ground, and that under the covenants contained in the conveyance to them they were bound to keep the same open as a recreation and pleasure ground for the use of the public for ever; and that they received about 90*l.* a year from minstrels and refreshment contractors, and expended about 400*l.* a year for the support and upkeep of the said pleasure ground.

The expenses of the proposed works were apportioned by the surveyor of the appellants on the premises abutting on the south side only of the said street, and nothing was apportioned upon the said land on the north or sea side thereof.

The respondents contended that under ss. 6 and 10 (2) of the

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 164: "Any urban authority may purchase or take on lease, lay out, improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.

"Any urban authority may make bye-laws for the regulation of any such public walk or pleasure ground, and may by such bye-laws provide for the removal from such public walk or pleasure ground of any person infringing any such bye-law by any officer of the urban authority or constable."

(2) Private Street Works Act, 1892, s. 6: "(1.) Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works): that is to say, to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting such street or part of a street; and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street. Any such resolution may include several streets or parts of streets, or may be limited to any part or parts of a street.

"(2.) The surveyor shall prepare, as respects each street or part of a street . . . .

"(*c*) A provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act. . . . .

Sect. 10: "In a provisional apportionment of expenses of private

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Private Street Works Act, 1892, the expenses of private street works are to be apportioned on the premises fronting, adjoining, or abutting on the street in respect of which the expenses are to be incurred, and that, as the said land on the north or sea side of the said street fronted, adjoined, and abutted on the said street, that land ought to have been included in the provisional apportionment and to have been charged towards the expenses of the proposed works.

The appellants contended that they were not owners within the meaning of the Public Health Act, 1875, and of the Private Street Works Act, 1892, of the said land on the north or sea side of the said street, the same being devoted to the use of the public as a recreation and pleasure ground, and being incapable of being let at a rack rent, and that the said land was not premises on which there could be charged expenses incurred in executing private street works under the Act of 1892.

The justices held that the land on the north or sea side of the said street was premises within the meaning of ss. 6 and 10 of the Private Street Works Act, 1892, and that all the premises fronting, adjoining, or abutting on the said new street, including the land of the appellants on the north or sea side thereof, ought to be inserted in the provisional apportionment, and they directed that the provisional apportionment should be amended accordingly.

On the application of the appellants, who were dissatisfied with this determination, the justices stated for the opinion of the King's Bench Division a case in which the foregoing facts appeared.

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street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises; but the urban authority may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations; (that is to say,)

"(*a*) the greater or less degree of benefit to be derived by any premises from such works;

"(*b*) the amount and value of any work already done by the owners or occupiers of any such premises . . . ."

The question for the opinion of the Court was whether the justices had come to a correct determination in point of law.

Alexander Glen, K.C., and *Randolph A. Glen*, for the appellants. If this case had arisen under the Metropolis Management Acts there can be no doubt that the lands of the appellants could not have been made chargeable in respect of the proposed works. The owners of lands which are extra commercium, or subject in perpetuity to the burden of a public right which deprives them of the beneficial use of the lands, are not owners of lands within the Metropolis Management Acts, and could not be charged with the expense of works done under those Acts: *Great Eastern Ry.* v. *Hackney District Board of Works* (1); *Wright* v. *Ingle* (2); *London County Council* v. *Wandsworth Borough Council.* (3) The lands in question are extra commercium and subject in perpetuity to the burden of a public right. If the appellants put them to any use other than that of a public recreation ground they could be restrained from so applying them by injunction in a suit by the Attorney-General: *Attorney-General* v. *Sunderland Corporation* (4); *Attorney-General* v. *Hanwell Urban District Council.* (5)

For the purposes of the present case there is no difference between the Metropolis Management Acts and the Private Street Works Act, 1892. "Premises fronting, adjoining, or abutting, &c." in the later Act mean premises which have an owner. By s. 6, sub-s. 3, copies of the resolution of the urban authority approving the plans and sections, &c., are to be served on the owners of the premises shewn as liable to be charged on the provisional apportionment. By s. 7 the owner of any such premises may object. By s. 11 if an estimate for the works is increased, copies thereof are to be served on the owners of the premises affected thereby. By s. 12 notice of the final apportionment therein provided for is to be served on the owners of the premises affected thereby. The true inference, therefore, is that the premises to be included in the provisional apportionment

(1) (1883) 8 App. Cas. 687.
(2) (1885) 16 Q. B. D. 379.
(3) [1903] 1 K. B. 797.
(4) (1876) 2 Ch. D. 634.
(5) [1900] 2 Ch. 377.

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are premises of owners who can be charged in respect of them. The owners of premises extra commercium are not chargeable in respect of them; and therefore such premises need not be included in the provisional apportionment.

Langdon, K.C., and *Walter Payne*, for the respondents Payne and Wood. The land in question is not extra commercium. Lands dedicated by Act of Parliament to the perpetual use of the public, as in *London County Council* v. *Wandsworth Borough Council* (1), or a church of the Established Church of England, which by virtue of its consecration is by the ecclesiastical law separated for ever from the common uses of mankind, as in *Angell* v. *Paddington Vestry* (2), may be properly said to be extra commercium or struck with sterility: *Wright* v. *Ingle* (3); but no case has ever gone the length of deciding that land acquired by an urban authority under s. 164 of the Public Health Act, 1875, is extra commercium; and such judicial authority as there is tends strongly to the contrary. An urban authority may acquire lands by lease for public recreation grounds. If they acquire them by lease the lands are not extra commercium: *Vestry of St. Mary, Islington* v. *Cobbett.* (4) If they acquire the fee it is only by covenant inter partes, and not by the law of the land, that the ground is held for the public; "but the restriction by covenant does not vary the nature of the property": *Robson* v. *Hyde* (5), per Lord Mansfield, cited in *Wright* v. *Ingle.* (3) Such restrictions may at any moment be put an end to by the consent of the parties interested. By s. 175 of the Public Health Act, 1875, any local authority may for the purposes and subject to the provisions of that Act sell or exchange any lands whether situate within or without their district. Land held on these terms is not subject in perpetuity to the burden of a public right: *Hackney Corporation* v. *Lee Conservancy Board.* (6) The cases of *Attorney-General* v. *Sunderland Corporation* (7), and *Attorney-General* v. *Hanwell Urban District Council* (8) do not touch the question. They do

(1) [1903] 1 K. B. 797.
(2) (1868) L. R. 3 Q. B. 714.
(3) 16 Q. B. D. 379.
(4) [1895] 1 Q. B. 369.
(5) (1783) Caldecott's Rep. 310, at p. 314.
(6) [1904] 2 K. B. 541.
(7) 2 Ch. D. 634.
(8) [1900] 2 Ch. 377.

not decide that these lands must be in perpetuity dedicated to public uses, but only that while so dedicated they cannot be applied to other purposes.

Further, even if the lands of the appellants are extra commercium they must nevertheless be included in the provisional apportionment, made under s. 6 of the Private Street Works Act, 1892; this is clear from ss. 6, 7, 10, 16 and 22 of that Act, the scheme of which is different from that of the Metropolis Management Acts. Authorities under those Acts are therefore no authorities in a case under the Act of 1892.

Hohler, K.C., and *Joseph*, for the respondents Farley and Smith, were not called upon.

LORD ALVERSTONE C.J. In this case the appellants have excluded from a provisional apportionment made under s. 6 of the Private Street Works Act, 1892, the whole of one side of a new street. The excluded side consists of land belonging to the appellants themselves, and used as a pleasure ground, and the effect of its exclusion is to cast upon the owners on the other side the whole cost of the private street works.

I will first state the reasons which have led me to the conclusion that this provisional apportionment is bad in that it does not include the land of the respondents. I think the scheme of this Act is that all the land on both sides of the street is to be included in the provisional apportionment. The question how much, if anything, is to be charged in respect of land so included is left open and arises subsequently; but in the first instance the provisional apportionment must include the land, whether chargeable or not, on both sides of the street; and if it does not do this, it is bad. Sect. 6, sub-s. 1, of the Act contains the words "and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street." I think the words "on the premises" were inserted advisedly with the primary intention of charging the premises as distinguished from the owners thereof. Then by sub-s. 3 of s. 6, the resolution approving the

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specifications, plans, and sections (if any), estimates, and provisional apportionments, are to be published as directed, and "copies thereof shall be served on the owners of the premises shewn as liable to be charged in the provisional apportionment. . . . ." This does not seem to me to restrict the class of premises to be included in the provisional apportionment; there may be good reasons why notice of the apportionment should be served upon owners who will not, as well as owners who will, ultimately be charged. The view I take of this Act seems clearly indicated by s. 7, which provides that during one month after publication of the provisional apportionment any owner of any premises shewn in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on the grounds (among others) that any premises ought to be excluded from or inserted in the provisional apportionment, or that the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection, or (where the provisional apportionment is made with regard to other considerations than frontage) in respect of the degree of benefit to be derived by any persons, or the amount or value of any work already done by the owner or occupier of any premises. Sect. 10 provides that in a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises; but the urban authority may, if they think just, resolve that in settling the apportionment regard shall be had to the greater or less degree of benefit to be derived by any premises from the works, and to the amount and value of any work already done by the owners or occupiers of such premises. Then, inasmuch as questions may arise as to whether any particular premises ought or ought not to be included in the provisional apportionment, s. 8 provides for the hearing and determination of objections to the apportionment subject to an appeal as therein prescribed. These enactments

appear to me to point to the inclusion in the first instance in the preliminary apportionment of all premises fronting, adjoining, or abutting upon the street, including even those as to which it may ultimately appear that nothing is to be charged in respect of them. Sects. 16 and 22 point clearly to the same conclusion. Sect. 16 provides that the incumbent or minister or trustee of any church, chapel, or place appropriated to public religious worship, which is for the time being by law exempt from rates for the relief of the poor, shall not be liable to any expenses of private street works as the owner of such church, chapel, or place, or of any churchyard or burial ground attached thereto, nor shall any such expenses be deemed to be a charge on such church, chapel, or other place, or on such churchyard or burial ground, or to subject the same to distress, execution, or other legal process, "but the proportion of expenses in respect of which an exemption is allowed under this section shall be borne and paid by the urban authority." The owners of other premises fronting the street would in such a case have an interest in seeing that a sufficient proportion was charged on the land; every person who pays his quota would clearly be entitled to know how much the urban authority were proposing to pay as their proportion of the expenses in respect of the church, chapel, or churchyard, &c. The Act therefore plainly prescribes that such places shall be included in the provisional apportionment, even though the owners are exempt from the payment of expenses. Sect. 22 tends almost as strongly in the same direction. It provides that no railway or canal company shall be deemed to be an owner or occupier for the purposes of the Act in respect of any land of such company upon which any street shall wholly or partially front or abut, and which shall at the time of the laying out of such street be used by such company solely as part of their line of railway, canal, or siding, station, towing path, or works, and shall have no direct communication with such street; and that the expenses incurred by the urban authority under the powers of the Act which, but for this provision, such company would be liable to pay, shall be repaid to the urban authority by the owners of the premises included in the apportionments and in such proportion as shall be settled by the surveyor; and that

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in the event of such company subsequently making a communication with such street they shall, notwithstanding such repayment as last aforesaid, pay to the urban authority the expenses which, but for the foregoing provision, such company would in the first instance have been liable to pay, and that the urban authority shall divide among the owners for the time being included in the apportionment the amount so paid by such company to the urban authority. These provisions lead me to the conclusion that the scheme and operation of this Act involves the inclusion in the provisional apportionment of all the premises fronting, adjoining, or abutting upon the street in question, and that the inclusion of the premises rather than the owners of premises was the primary object of the Act.

That would be enough to dispose of this appeal; but inasmuch as there is another point which has been argued at length, I think it right to decide that point also. Assuming for the moment that premises which cannot be called upon to contribute need not be included in the provisional apportionment, counsel for the appellants contend that the land of the appellants cannot be called upon to bear any of these expenses. I cannot agree that any such ground of exemption, if it were good in law, has in truth been made out. It is stated in the special case that it was admitted or proved before the justices that the new street in question had buildings on the south side only; that the land on the north or sea side of the said new street, known as the East Cliff, belongs to the appellants and was purchased by them under the Public Health Act, 1875, for the purpose of a public pleasure ground; and that under the covenants contained in the conveyance to them they were bound to keep the same open as a recreation and pleasure ground for the use of the public for ever. Counsel admitted that if the sterility with which the land is said to be stricken had been imposed merely by covenant inter partes he must fail to establish his claim to exemption; but he says that as the urban authority acquired the land for the purposes of a recreation and pleasure ground, the Attorney-General, on the relation of any ratepayer in the district might get an injunction restraining the urban authority from putting the land to any other uses. But that falls short of conferring on the land

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exemption on the ground of what has been called sterility. The principle on which that exemption rests is stated by Lord Watson in *Great Eastern Ry.* v. *Hackney Board of Works.* (1) "The authorities cited in the course of the argument," said Lord Watson, "appear to me to establish this proposition, that the person vested with the property of heritable subjects which have been placed extra commercium or are subject in perpetuity to the burden of a public right, which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862:—" that is to say, the Metropolis Management Act, 1862, which for all material purposes contains the same definition of "owner" as does the Private Street Improvement Act, 1892. That passage from Lord Watson's judgment is cited by Vaughan Williams L.J., in *London County Council* v. *Wandsworth Borough Council* (2), as is also the following passage from the judgment of Bowen L.J., in *Wright* v. *Ingle* (3): "Whether in the case of premises which were prevented by an Act of Parliament from being let at a rack rent there ever could be an owner within the meaning of s. 250—i.e., of the Metropolis Management Act, 1855—I very much doubt. I am inclined to think that if the incapacity to be let were stamped on the premises, they never could have an 'owner' within the meaning of s. 250." There is also a passage in the judgment of Stirling L.J., in *London County Council* v. *Wandsworth Borough Council* (4), to which I wish to refer; it is as follows: "Now, Tooting Beck Common is by the scheme and statute of 1873"—i.e., The Metropolitan Commons Supplemental Act, 1873 (36 & 37 Vict. c. lxxxvi.)—"dedicated to the public as a 'common or recreation ground,'" and Mathew L.J., in the same case, said that "The County Council had the legal estate in the land which was vested in them for the perpetual use thereof by the public for exercise and recreation, and the erection thereon of such buildings and appliances as they might think requisite for those and the like purposes"; and later on in the same judgment the following passage occurs: "Sect. 250, it seems to me, was intended to describe persons who had, or who

(1) 8 App. Cas. 687, at p. 693.
(2) [1903] 1 K. B. 797, at p. 804.
(3) 16 Q. B. D. 379.
(4) [1903] 1 K. B. 797, at p. 808.

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represented, proprietary rights in premises abutting upon a street. The charge for the improvements in question might properly be imposed upon such persons because the value of their interests was likely to be enhanced by the outlay. I do not think that the definition was intended to include imaginary or hypothetical owners. So far as the County Council was concerned the land by Act of Parliament was rendered sterile and deprived of any commercial value." It seems to me that the facts stated in this special case fall far short of bringing the land in question within the exemption claimed for it and of bringing the present case within the principles of *Great Eastern Ry.* v. *Hackney Board of Works* (1) and *London County Council* v. *Wandsworth Borough Council.* (2) The cases of *Attorney-General* v. *Sunderland Corporation* (3) and *Attorney-General* v. *Hanwell Urban District Council* (4) only go to this, that the local authorities cannot, so long as they hold land acquired for some statutory purpose, apply it to any other purpose. In order to get exemption it must be shewn that the premises have not got an owner because by some statute, or by the common law, or by some irrevocable disposition which is to endure for ever, the land in question is struck with sterility. Therefore, on two grounds, firstly, because the apportionment is bad on the ground that it did not contain this land, even assuming it to be extra commercium, and, secondly, because the land was not in truth extra commercium, the decision of the justices was right and this appeal must be dismissed.

DARLING J. I am of the same opinion. To hold that this land was subject to the doctrine which excludes from apportionment land which is withdrawn from productive uses would be to give a great extension to a doctrine which, in my view, ought not to be extended. To exclude the land in question from the provisional apportionment would have the effect of making the owners on the south side of the street pay for all the convenience and benefit which is derived from the new works and enjoyed by those who use the land on the north side. It would require much

(1) 8 App. Cas. 687.
(2) [1903] 1 K. B. 797.
(3) 2 Ch. D. 634.
(4) [1900] 2 Ch. 377.

stronger authority than any yet cited to us to lead me to a conclusion which would have such a result.

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PHILLIMORE J. I concur, and have nothing to add.

Appeal dismissed.

Solicitors for appellants: *A. B. Sanders, for Joseph Jupp, Herne Bay.*

Solicitors for respondents Payne and Wood: *Wood & Sons.*

Solicitors for respondent Farley: *Warren, Murton & Miller, for Furley & Furley, Canterbury.*

Solicitors for respondent Smith: *Warren, Murton & Miller, for Norman & Stigant, Chatham.*

W. H. G.

ollowed. BALL *v.* L.C.C. [1949] All E.R. 1056.

[IN THE COURT OF APPEAL.]

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March 19, 20.

MALONE *v.* LASKEY AND ANOTHER.

Landlord and Tenant—Liability of Landlord for Injury happening to Stranger during Tenancy—Landlord under no contractual Liability to Repair—Repairs in fact done by Landlord—Negligence of Landlord's Servants in Executing Repairs—Nuisance.

The defendants, who were the owners of considerable house property, let a house to a tenant, who subsequently sub-let it to a company, whose manager resided on the premises with his wife (the plaintiff) and his family; the defendants were not liable to do any repairs to the house. In the lavatory of the house was a water tank, which became insecure, owing, as was alleged, to the vibration caused by an engine and machinery upon adjoining premises of the defendants, which were used by them for the purpose of generating electricity for the lighting of their property. Complaints of the insecurity of the water tank were made by the plaintiff and her husband to the tenant, who forwarded them to the defendants. Ultimately the defendants sent two workmen, who were their own servants, to do the necessary repairs, and an iron bracket was fixed underneath the tank to support it. Three months afterwards the bracket fell upon the plaintiff and seriously injured her. The jury found that the bracket fell by reason of the working of the defendants' engine, that the working of the engine amounted to a nuisance, and that the work of repair in putting up the bracket was done in ; of improper and negligent manner and the apparatus left in a condi and dangerous to persons properly using the lavatory:—

Held, first, that the plaintiff had no cause of action against with

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defendants on the ground of nuisance, because she had no interest in the premises or right of occupation in the proper sense of the term; secondly, that she could not recover on the ground of negligence, for there was no contractual relation between the plaintiff and the defendants, and the doing of the repairs was a voluntary act on the part of the defendants not done in the discharge of a duty to the plaintiff; and that, as the defendants had no control of the premises, there was no invitation on their part to the plaintiff, but at the utmost an innocent representation as to the state of the premises, which, as they had employed apparently competent men to do the repairs, gave the plaintiff no cause of action.

APPEAL of the defendants from the verdict and judgment in an action tried before Darling J. and a jury.

The plaintiff was a married woman, and the defendants were the trustees of the Birkbeck Permanent Benefit Building Society, who were the owners of certain premises known as 44, Southampton Buildings, Holborn, and of other premises adjoining. The writ in the action was indorsed with a claim for damages for nuisance caused by (*a*) the defective state of 44, Southampton Buildings, and (*b*) the vibration occasioned by certain machinery of the building society situate in the immediate rear of those premises; also with a claim for damages for negligence in insufficiently repairing a certain water tank in the lavatory of those premises, whereby the plaintiff was seriously injured.

The statement of claim alleged that the plaintiff was the wife of Thomas Stratford Malone, and had at all times material resided with him at 44, Southampton Buildings, of which and of certain adjoining property the building society were the owners; that the defendants erected and placed on their adjoining premises large engines and plant for the purpose of generating electricity to light their property, and that they worked the engines and machinery in such a manner as to constitute a nuisance to the occupiers of all adjoining property by reason of the great noise and vibration; that by reason of the vibration the premises in which the plaintiff resided were severely shaken and injured, and that in particular a water tank fixed in the lavatory was rendered unsafe and dangerous to persons using the same; that in consequence of complaints made by plaintiff's husband and other occupiers of the premises the defendants from

time to time sent workmen to repair the damage and make the premises safe for habitation; and that the defendants through their workmen or agents executed the repairs in a negligent and improper manner, and in such a way as to leave the tank in a dangerous and improper condition for those using the lavatory. There was an alternative allegation that, if the repairs were executed properly, the tank again became unsafe and dangerous by reason of the vibration arising from the defendants continuing the nuisance. The statement of claim went on to allege that on May 7, 1905, while the plaintiff was using the lavatory, the supports of the water tank gave way without warning and partly fell, and the bracket supporting the tank struck the plaintiff on the head and back and caused serious and permanent injuries. In particulars subsequently delivered under a Master's order it was said that the negligence complained of consisted in the manner in which the tank was refixed by the defendants' workmen; that the supports used for the tank were not strong enough for the purpose, nor were they sufficiently or securely attached to the main walls of the building; and that the main walls were in so old and defective a condition as to be unable to support the tank without special precautions which were not taken. By their defence the defendants pleaded that the premises had been let by them, and that they were under no liability to repair; they denied all the allegations of nuisance and negligence, and as to the latter they alleged in the alternative that, if they made the repairs (which they denied), they did so at the request of the tenants of the premises, and employed skilled and competent men to do them.

At the trial it appeared that in 1899 the defendants, as trustees of the Birkbeck Building Society, let the premises 44, Southampton Buildings, under an oral agreement to a firm of Witherby & Co., who were law stationers, as yearly tenants, and that the tenancy of Witherby & Co. was still in existence at the date of the accident. Under the agreement the defendants were under no liability to repair the premises. In 1901 Witherby & Co. sublet a portion of No. 44 to the Script Shorthand Company, of which company the plaintiff's husband was the manager and secretary. In that capacity the plaintiff's husband resided with

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his wife and family upon the portion so sub-let, his occupation of the premises being apparently part of his remuneration for his services to the Script Shorthand Company. In 1902 the electric light engine and machinery referred to in the statement of claim were first erected on adjoining premises of the defendants, and they had been worked continuously since that date. There was evidence that in 1904 the plaintiff and her husband had complained to Witherby & Co. of the vibration caused by the working of the engine and of the condition of the water tank in the lavatory, which they alleged to be unsafe, and that these complaints had been forwarded by Witherby & Co. to the defendants. In January, 1905, the defendants sent two plumbers, who were servants of the defendants and members of the permanent staff kept for attending to house property belonging to the building society, to repair the water tank. The plumbers put up a bracket to support the tank, and it was this bracket which on May 7 following fell and injured the plaintiff.

The following were the questions left to the jury, with their answers: (1.) "Did the bracket fall by reason of the working of the boilers and engines of the defendants?" Answer: "Yes." (2.) "Did such workings cause a vibration amounting to a nuisance?" Answer: "Yes." (3.) "If so, was the injury to the plaintiff the consequence of that?" Answer: "Yes." (4.) "Did the defendants, when they put up the bracket and placed the tank upon it, do this work in an improper or negligent manner, and leave the apparatus in a condition dangerous to anyone properly using the lavatory?" Answer: "Yes." (5.) "If so, was the plaintiff injured in consequence of such action on the part of the defendants?" Answer: "Yes." The jury assessed the damages at 400*l.*, and the learned judge gave judgment for the plaintiff. The defendants appealed.

Montague Lush, K.C., and *Ricardo* (*C. Bray* with them), for the defendants. There was, in fact, no evidence of a nuisance by vibration; but, assuming that there was such evidence, it amounted to a private nuisance only. There was no evidence of a public nuisance, in respect of which an individual may sue if

he suffers special damage, as was the case in *Tarry* v. *Ashton*. (1) There can be no right of action in respect of a private nuisance except in respect of a proprietary right in premises affected by it. The present case being, at the highest, one of discontinuous nuisance, the only person who could have a right of action in respect of it would be the occupier of the premises affected: *Jones* v. *Chappell* (2); Bullen & Leake, tit. Nuisance; Addison on Torts, 7th ed. pp. 362, 408. The plaintiff was not the occupier of, and had no interest in, the premises. The findings of the jury are really inconsistent with one another, for if (as they have found) the damage was occasioned by the negligence of the defendants' servants in not properly fixing the bracket, it cannot be regarded as the result of the nuisance. On the other hand, the vibration could not for the present purpose be looked upon as a nuisance merely because it brought down a bracket which was not properly fixed. With regard to the cause of action based upon the alleged negligence in the fixing of the bracket, the plaintiff can have no right of action, for the defendants owed no duty in the matter to her, there being no contract on their part with her to repair the premises: *Cavalier* v. *Pope*. (3) There being no contractual obligation on the defendants to repair the premises, their doing so was a gratuitous act. The doctrine upon which the so-called "trap" cases, of which *Indermaur* v. *Dames* (4) is a well-known instance, proceeded is inapplicable to the present case; they are cases in which persons in the possession or control of premises invited the plaintiff to come upon them, there being at the time some trap or defect thereon, as in *Miller* v. *Hancock* (5), where the landlord retained possession and control over a staircase which proved defective. The present defendants were not in possession or control of the premises where the accident happened. [They also cited *Nelson* v. *Liverpool Brewery Co.* (6); *Earl* v. *Lubbock*. (7)]

Powell, K.C. (*C. Herbert Smith* and *Ralph Thomas* with him), for the plaintiff. The jury in effect found that the bracket was

(1) (1876) 1 Q. B. D. 314.
(2) (1875) L. R. 20 Eq. 539.
(3) [1905] 2 K. B. 757; [1906] A. C. 428.
(4) (1867) L. R. 2 C. P. 311.
(5) [1893] 2 Q. B. 177.
(6) (1877) 2 C. P. D. 311.
(7) [1905] 1 K. B. 253.

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negligently and improperly put up by the defendants' servants, and that by their action the defendants shook it down. Upon the facts and the findings of the jury the plaintiff is entitled to recover, either on the ground of negligence, or of trespass to the person, or of nuisance. As to negligence, a heavy article like a bracket, placed at a considerable height above the floor, is a dangerous thing if insecurely fixed, and persons who, like the defendants, place such an article in such a position and neglect to make it secure are responsible for any injury occasioned in consequence to persons whose coming in the ordinary course o things into proximity to the article so placed they ought to have contemplated: *Heaven* v. *Pender* (1) ; *Le Lievre* v. *Gould.* (2) In *Rylands* v. *Fletcher* (3) water collected in a reservoir was held to be a dangerous thing, and a heavy article raised some distance above the surface of the ground is at least equally dangerous. [On this point he also cited *Midwood* v. *Manchester Corporation* (4) ; *Parry* v. *Smith.* (5)] Cases such as *Cavalier* v. *Pope* (6) and *Lane* v. *Cox* (7) have no bearing on the present case; they were cases of mere non-repair on the part of the landlord, and acts of nonfeasance stand on a very different footing from acts of misfeasance. If the defendants, on complaints being made, had merely refused to do anything, on the ground that they were under no contractual liability to repair, the case would no doubt have been very different. But as they elected to come upon the premises and do the repairs, those concerned were entitled to suppose that they had done the work properly and made all safe; and to leave the bracket insecurely and insufficiently fastened was laying a trap for persons who might come into proximity to it and upon whom it might fall. Having assumed to undertake the repairs, the defendants subjected themselves to the obligation of using due care in carrying them out, so as not to create a dangerous trap for inmates who might make use of the lavatory. In *Skelton* v. *London and North Western Ry. Co.* (8) Willes J. pointed out the difference in this connection

(1) (1883) 11 Q. B. D. 503.
(2) [1893] 1 Q. B. 491, at p. 497.
(3) (1868) L. R. 3 H. L. 330.
(4) [1905] 2 K. B. 597.
(5) (1879) 4 C. P. D. 325.
(6) [1905] 2 K. B. 757; [1906] A. C. 428.
(7) [1897] 1 Q. B. 415.
(8) (1867) L. R. 2 C. P. 631.

between acts of omission and commission, and said: "If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs* v. *Bernard*." (1) The defendants were not, it is true, in occupation or control of the premises when the accident happened, and therefore the case is not, so far, on the same footing as the cases in which persons in occupation or control of premises on which there was a trap invited the plaintiff to come on the premises. But the same principle really applies. The defendants assumed control of the premises for the purpose of doing the repairs, and, having undertaken and affected to do such repairs as were necessary, they in effect invited those whom they must know in the ordinary course of things would use the lavatory to do so, and impliedly represented that they might safely use it; they thereby incurred a duty to those persons of not negligently leaving the place in a latently dangerous state. *Collis* v. *Selden* (2) is not an authority against the plaintiff's contention; that case was decided on demurrer at a time when the rules of pleading were much stricter and more technical than they now are, and turned on a point of pleading, the declaration being held to be bad because it did not state any facts from which a duty towards the plaintiff could be implied. The reasons for the decision were thus stated by Willes J.: "The declaration is not founded upon any duty of the occupier of the house to protect persons lawfully coming there against any hidden danger of which the defendant knew or ought to have known; but it is founded on alleged carelessness in doing an act, namely, hanging a chandelier. The chandelier is to be regarded as movable property, and the declaration should have shewn either that it was a thing dangerous in itself and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house. If that averment had been made and proved, the case might fall within the class to which *Sullivan* v. *Waters* (3) belongs—as a trap to persons using or likely to use the way, whether public or not." These observations seem to indicate that, on proper

(1) (1703) 2 Lord Raym. 909; 1 Sm. L. C. (11th ed.) 173.

(2) (1868) L. R. 3 C. P. 495.

(3) (1864) 14 Ir. C. L. R. 460.

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averments, there would be a cause of action in such a case as the present. The bracket, being a heavy article, was, in the situation in which it was, a thing dangerous in itself, and it was so put up as to be dangerous to persons using the lavatory, and whom the defendants must have contemplated as likely to use it. [They also cited on this point *Corby* v. *Hill* (1); *Gallagher* v. *Humphery*. (2)]

Apart from negligence, the plaintiff is entitled to recover in respect of trespass to the person. The jury have found that by the vibration of their engines the defendants shook down the bracket, the legal result of which is the same as if they had dropped it out of their own hands upon the plaintiff.

As regards the liability founded upon nuisance, it is not necessary that the person aggrieved should be the tenant of the premises or should have an interest in the property, and the action is maintainable without shewing that any injury has been caused to the property itself: *Benjamin* v. *Storr*. (3)

[FLETCHER MOULTON L.J. That was a case of a public nuisance, which involves very different considerations.]

Lush, K.C., in reply. [He was directed to confine his argument to the point whether the defendants, by doing the repairs, represented that the place was safe.] There are only three classes of case in which the Courts have laid down that, apart from any contractual obligation, such an action will lie, and they all turn upon the existence of a duty on the part of the person sought to be made liable. The first is where the act committed amounts to a public nuisance, which is a breach of duty alike to the public and to the person who sustains a particular injury from it. The second is where something that has been called a "noxious thing" is left in a position in which an unknown person may come in contact with it; the thing so left must, however, fall within the class of noxious things. The third class is where a person, having the control of premises, invites another to come upon the premises, in which case he will be liable to the person invited if the latter is injured by reason of a trap upon the premises, the existence of which was

(1) (1858) 4 C. B. (N.S.) 556. (2) (1862) 10 W. R. 664.
(3) (1874) L. R. 9 C. P. 400.

known, or ought to have been known, to the person inviting. In the last class control of the premises is an essential condition of liability, and it was the retention by the owner of the control of the staircase in *Miller* v. *Hancock* (1) which made him liable. There being no initial duty on the part of the defendants, the fact that they interfered by doing the repairs did not create a duty on their part. There was no invitation by the defendants to the plaintiff, and in the absence of control, there was no representation by them as to the state of the premises. Even if doing the repairs amounted to a representation, it was an innocent representation, and in the absence of deceit gave no right of action. Assuming that it could possibly be held that both control and invitation existed here, the proper test under the circumstances is not whether the defendants knew or ought to have known that the bracket was unsafe, but whether they exercised reasonable care in doing the work of repair. [He also cited *Scholes* v. *Brook*. (2)]

SIR GORELL BARNES, PRESIDENT. In this case the plaintiff sues the defendants for damages for injuries sustained by her under circumstances which I will state sufficiently fully to indicate the point that we have to decide. The premises on which the accident happened belong to the Birkbeck Building Society, and the defendants are the trustees for that society. A house which belonged to them was let by the defendants in 1899 to Witherby & Co., who in 1901 sub-let a portion to the Script Shorthand Company. Malone, the plaintiff's husband, was in that company's employ and occupied a part of the premises, apparently as part of the consideration for his services to his employers. There was a lavatory in the house, of which Malone and his family had the use and apparently the exclusive use; and in the lavatory there was a flush cistern, which was fixed against the wall. About the end of 1904 the cistern was said to be in an unsafe condition, and a communication was made by the plaintiff or her husband to Witherby & Co. on the subject. On December 26 Witherby & Co. wrote to Priest, who was one of the staff employed by the defendants, saying that the

(1) [1893] 2 Q. B. 177. (2) (1891) 63 L. T. 837.

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cistern required to be replaced and was then in a dangerous condition. On January 6, 1905, the plaintiff wrote another letter of complaint to the representative of Witherby & Co., in which vibration was alluded to as a cause of the dangerous state of the cistern. The vibration to which that letter referred arose from the working of an electric light engine which was worked by the defendants on their premises close to this building, and its constant working is said to have affected the security of the cistern or tank. Some time in the same month the defendants, to whom the complaints had been handed on by Witherby & Co., sent two plumbers, who were the servants of the defendants and part of their permanent staff, to rectify the defect in the condition of the cistern. The plumbers placed an iron bracket under the cistern to support it, and were then apparently satisfied that they had left it secure. This unfortunately turned out not to be the fact. In May, 1905, while the plaintiff was in the lavatory, she was injured by the bracket falling on her and inflicting injuries, to recover damages for which she brought the present action. At the trial Darling J. left certain questions to the jury, in answer to which they found that the bracket fell by reason of the working of the engine; that the working of the engine amounted to a nuisance; that the plaintiff's injuries were the consequence thereof; that the defendants put up the bracket in an improper and negligent manner, and left the apparatus in a dangerous condition, and that the plaintiff was injured in consequence; and they assessed the damages at 400*l*. We are now asked to set aside the judgment for the plaintiff and enter judgment for the defendants, or to send the case back for a new trial, but the substantial point argued has been whether judgment should be entered for the defendants. There is one further fact which I ought perhaps to mention. The plaintiff said in cross-examination that she remembered that when the new bracket was put up she did not think it was safe, and that she wrote again about it. There is also some evidence given by the husband and daughter that the tank shook after the bracket was put up. No question, indeed, was put to the jury as to the knowledge of the plaintiff that the cistern was still unsafe, possibly because the plaintiff had been considerably injured by the accident, and her evidence

was therefore kept as short as possible. Therefore any discussion of the question whether the plaintiff knew the risk, and accepted the position of acting as though the cistern were safe, must be conducted independently of any finding of the jury on the point.

The two main questions argued before us were (1.) whether the plaintiff had a cause of action arising from the nuisance alleged, which question involves the consideration of the first three questions left to the jury; and (2.) whether there was a cause of action based on the negligence of the defendants in undertaking to do the work and doing it in such an improper manner that injury resulted to the plaintiff. As to the first question, I must confess to feeling some doubt whether there was any substantial evidence that the fall of the bracket was due to the alleged vibration, but that would only affect the question of whether there should be a new trial. I doubt whether the findings of the jury can be correct; the plaintiff contended that the use of oil in the engine had made a change, but the defendants reverted from January to May to the use of coal; and further, as the engine had been working for years, it is not likely to have done this damage in three months. The main question, however, on this part of the case is whether the plaintiff can maintain this action on the ground of vibration causing the damage complained of, and in my opinion the plaintiff has no cause of action upon that ground. Many cases were cited in the course of the argument in which it had been held that actions for nuisance could be maintained where a person's rights of property had been affected by the nuisance, but no authority was cited, nor in my opinion can any principle of law be formulated, to the effect that a person who has no interest in property, no right of occupation in the proper sense of the term, can maintain an action for a nuisance arising from the vibration caused by the working of an engine in an adjoining house. On that point, therefore, I think that the plaintiff fails, and that she has no cause of action in respect of the alleged nuisance.

But the main difficulty of the case arises on the question whether the plaintiff can maintain an action on the ground of negligence. It is said that the defendants, by doing the repairs to the cistern, undertook a duty towards the plaintiff to do them

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properly and leave the cistern safe, and that by doing them improperly and leaving the apparatus in such a condition that the bracket fell they committed a breach of that duty. It is unnecessary for me to wade through the mass of authorities which have been cited to us; many of them turned upon facts which are not germane to the present case and upon principles which are not applicable; I propose to deal only with the facts of the present case, and with the grounds upon which I think that a cause of action arising from negligence is not maintainable. In the first place, it has not been suggested that there was any contractual relationship between the plaintiff and the defendants. Secondly, there is no ground for saying that the defendants undertook any duty towards the plaintiff. She had complained to Witherby & Co., who communicated her complaints to the defendants; whereupon the defendants, although under no obligation to do so, as a matter of grace sent their plumbers to remedy the defect; that was an entirely voluntary act on their part, and was not done in the discharge of any duty which they owed to the plaintiff. The argument on behalf of the plaintiff, as I understand it, is that the case is analogous to the class of cases in which the control and the possession of premises rests with the owner, who gives a permission or invitation to persons to come on the premises in order to do work or for other purposes, in which case the law holds that a duty is imposed upon the owner to take reasonable care that his premises are not in a state likely to cause injury to persons so coming on to them. In my opinion the present case is very far removed from that class of case. In the first place, the defendants were not in possession nor in occupation of these premises, nor did they exercise control over them; they had let the premises to Witherby & Co., who had in turn sub-let a part to the Script Shorthand Company, who were the employers of the plaintiff's husband and allowed him to live there with his family. Under these circumstances it cannot be successfully contended that there was any invitation by the defendants to the plaintiff to occupy or use the premises; the utmost that it is possible to extract from the facts is that there was an innocent representation on the part of the defendants that by reason of what was

done by their men the premises were in a safe condition for use. As to that, the defendants, though they must be taken to have known at the outset that the cistern had become dangerous, employed apparently competent workmen (who were their own servants) to rectify the defect, and it has not been suggested that the defendants had any reason to doubt that the work was done in a proper manner. That being so, there was at the time of the accident no knowledge on the part of the defendants that the cistern was a source of danger to persons using the lavatory. The utmost that can be said is that what was done amounted to a representation by the defendants that the plaintiff might safely use the lavatory, and, even if it did amount to such a representation, it was an innocent representation and gave the plaintiff no cause of action. In my judgment the case is not brought within any class of cases in which a plaintiff has been held entitled to recover damages from a defendant on the ground of negligence. It certainly does not come within the class where the owner of property, having the possession and control of his property, invites persons to come on to his premises, nor do I think that it comes within any class of case in which negligence gives a cause of action. There must, therefore, be judgment for the defendants.

FLETCHER MOULTON L.J. I am of the same opinion. So far as the plaintiff's case is based upon nuisance, the contention on her behalf appears to me to be supported by no authority. Witherby & Co. were the tenants and occupiers of these premises, and if the premises had been injured or the enjoyment of them interfered with by the vibration it was open to them to take any one of three courses—they might come to the Courts for an injunction to stop the vibration, or they might simply have tolerated it, or they might have authorized its continuance either gratuitously or for a valuable consideration. A person in the position of the plaintiff, who was in the premises as a mere licensee, had no right to dictate to Witherby & Co. which course they should take, and they seem to have voluntarily permitted the vibration to continue. Indeed, if it is permissible to conjecture, I have very little doubt that the proximity of the engine was by no means an unmixed evil to them, for it may well have

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affected the amount of rent paid by them for the premises. But, whether that be so or not, it was a matter entirely for the tenant, and a person who is merely present in the house cannot complain of a nuisance which has in it no element of a public nuisance.

Upon the ground of negligence, too, I am clearly of opinion that the action is not sustainable. There was no obligation upon the defendants to do any repairs to the premises, nor was any suggestion to that effect made at the trial. The repairs to the cistern which they in fact did were done by them gratuitously. However, in order to test the plaintiff's case, I will suppose that the defendants did the repairs for reward to them from Witherby & Co. There would then be a contractual relationship between Witherby & Co. and the defendants, and the latter would be bound to exercise reasonable care to see that the work was properly done. If the work was done negligently, the defendants would be liable to Witherby & Co. for the damage done to them by the negligence or done to others under circumstances which involved a liability on the part of Witherby & Co. But that would be purely a liability on the part of the defendants to Witherby & Co., for no rights can be acquired under a contract except by parties to the contract, except in certain special cases having no bearing on the matters before us. I do not wish to express any opinion upon the question whether Witherby & Co. were under any liability to the plaintiff; if there were any such liability, it would be because it was their duty to have the premises in a fit condition for safe occupation, and they failed to do so. But in either alternative there would arise no duty on the part of the defendants towards the plaintiff. If their having given permission to the plaintiff to occupy the premises in the state in which they chose to have them created no liability on the part of Witherby & Co. towards the plaintiff, it is plain that there is no liability on the part of the defendants to the plaintiff. If, on the other hand, Witherby & Co. were under a liability towards the plaintiff, it is they who must be sued by her. The argument for the plaintiff is based on a misapprehension of the effect of negligence in the performance of a contract; it is contended that in a contract there is a representation made to the whole world that the contract will be

performed without negligence. I know of no such doctrine. If representation is a word which is properly applicable to such a case, it is confined to the other contracting party; the supposed doctrine of a warranty to the whole world is supported by no authority, and is contrary to the accepted idea of the nature of contractual rights. I can find no trace in the evidence of a representation by the defendants to the plaintiff that the work was properly done, and, even if such a representation was made, it is impossible to hold that they are under any obligation to the plaintiff, for there is no evidence that they knew that the bracket was in an unsafe state when the repairs had been done, and therefore it was an innocent representation which gave no right of action. I think therefore that the case based on negligence fails equally with that based on nuisance.

KENNEDY L.J. I am of the same opinion. On the question of vibration there is no more to be said. No question was asked of the jury whether what was done by the defendants amounted to a public nuisance, and I agree that the mere existence of vibration amounting only to a private nuisance to the occupiers of the premises gave no cause of action to the plaintiff in respect of the alleged consequences of the vibration.

On the question of negligence I confess that I feel more doubt than my brother Moulton. Where a person, upon premises where he assumes or undertakes to do work, does the work badly, if the result is to cause injury to a person who is lawfully there, there are certainly some cases in which an action on the case will lie. Attempts have been made to formulate the classes of cases, apparently anomalous, in which an action for negligence has been held to lie where there is no contractual obligation. I agree that the cases in which it has been held that there is a cause of action because a person has proprietary rights over premises on to which another person has been invited to come present difficulties of principle. My difficulty in the present case may be put thus. Persons were lawfully on premises which were the property of the defendants, and the defendants, instead of employing independent contractors, sent their own servants to do certain necessary repairs; we are asked to set aside the

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judgment, not merely to grant a new trial, and we must therefore accept the finding of the jury that the work was improperly done by the defendants' servants: ought not knowledge that the cistern was left in an unsafe condition to be imputed as continuing knowledge on the part of the defendants? Their servants did the work and left the place dangerous; may it not be argued that, if a scienter is necessary, the defendants had an interest in the premises, though not the control over them, and that if they chose to send in their servants to do the work, they are responsible not merely for any direct action of their servants causing injury to persons lawfully upon the premises, but also for the remoter consequences of their action, because the knowledge of their servants is their own knowledge? I accept the finding that the result of the acts of the defendants' servants was to leave the premises in a dangerous condition, and I feel some doubt upon what certainly appears to me to be a difficult point upon that finding. Upon the whole, however, I am unable to dissent from the argument presented to us by Mr. Lush that, assuming the findings of fact to be correct, the case cannot be brought within the class of cases where the defendant's liability depends upon his continuing control of the premises, for here the defendants had none in fact; if the plaintiff had written a letter of complaint to the defendants, Witherby & Co. might well have refused to allow the defendants to come in to do the repairs in premises to which they (the defendants) had no right of entry. Neither does the case come within the class of case where there is something noxious or dangerous forming part of a building, which amounts to a public nuisance. I feel compelled to hold that no cause of action has been in point of law established, though no doubt the case is one of apparent hardship, and that the plaintiff's right of redress (if any) must be against the immediate superior in occupation, with whom there is a real relationship.

Judgment for defendants.

Solicitors for plaintiff: *Wrentmore & Son.*

Solicitors for defendants: *Rubinstein, Myers & Co.*

W. J. B.

THE KING *v.* THE GOVERNOR OF BRIXTON PRISON. *Ex parte* VAN DER AUWERA.

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March 25.

Extradition—Crime committed in Belgium—Prescriptive Period for Punishment—Order of Committal to await Surrender made within prescriptive Period, but during Time Prisoner serving Sentence for Crime committed in England—Arrest under Order of Committal after Expiration of prescriptive Period—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 3, *sub-s.* 3; *ss.* 10, 11—*Extradition Treaty between United Kingdom and Belgium of October* 29, 1901, *arts.* 9, 11—*Belgian Penal Code, arts.* 92, 96.

Where a metropolitan magistrate commits a fugitive criminal, alleged to have been convicted in a foreign country of an extradition crime, to prison there to await the warrant of a Secretary of State for his surrender under s. 10 of the Extradition Act, 1870, and by virtue of s. 3, sub-s. 3, of the Act the prisoner's surrender cannot take place till after the expiration of a sentence inflicted on him in England for an offence committed in England, the order of committal will, if made before exemption from punishment for the extradition crime takes place in the foreign country by lapse of time, be valid and remain in full force until the expiration of the sentence inflicted upon the prisoner in England, although exemption from punishment for the extradition crime may have then taken place in the foreign country by lapse of time; and a writ of habeas corpus to bring up and discharge the prisoner upon the ground that the extradition offence is no longer punishable in the foreign country will not be granted.

Rule nisi calling on the governor of Brixton Prison to shew cause why the applicant, Michel Louis van der Auwera, who had been committed to Brixton Prison by a metropolitan magistrate there to await his surrender to the Belgian Government, should not be brought up and discharged upon the ground that, by art. 92 of the Belgian Penal Code, the offence for which the applicant was sentenced was no longer punishable in Belgium, the period of prescription having expired. On June 28, 1901, the prisoner was convicted of larceny in Belgium in his absence par contumace. The time for appealing expired on July 9 following. The prescriptive period of five years, which is fixed by art. 92 of the Belgian Penal Code (1), then began to run. On

(1) The following translation of the material portions of the Belgian Penal Code, the Code d'Instruction Criminelle, and the Treaty between the United Kingdom and Belgium for the Mutual Surrender of Fugitive

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February 8, 1906, he was arrested in England on a charge of obtaining money by false pretences in England. On March 9,

Criminals, dated October 29, 1901, was used by the Court:—

Belgian Penal Code, art. 92: "Correctional punishment will be lost by prescription after five completed years, counting from the date of the decree or judgment given in the last resort, or counting from the day when the judgment given in first instance could no longer be contested by way of appeal."

Art. 96: "Prescription of punishment" (that is, the period after which exemption from punishment takes place through lapse of time) "will be interrupted by the arrest of the convicted person."

Code d'Instruction Criminelle, s. 476: "If the accused surrenders, or is arrested before his sentence has been extinguished by prescription, the judgment by default and all the proceedings against him from the date of the warrant for his arrest . . . . shall be nullified as of right, and the case shall be proceeded with in ordinary form."

Sect. 641: "In any case, those who have been condemned by default or for contumacy, and whose sentence has been prescribed, shall not be allowed to appear and purge their contempt or contumacy."

Treaty between the United Kingdom and Belgium for the Mutual Surrender of Fugitive Criminals, dated October 29, 1901, art. 1, clause 29: "In no case can the surrender be made unless the crime shall be punishable according to the laws in force in both countries with regard to extradition."

Art. 9: "The surrender shall not take place if, since the commission of the acts charged, the accusation, or the conviction, exemption from prosecution or punishment, has been acquired by lapse of time, according to the laws of the country where the accused shall have taken refuge."

Art. 11: "If the individual claimed should be under process, or condemned by the Courts of the country where he has taken refuge, his surrender may be deferred until he shall have been set at liberty in due course of law. In case he should be proceeded against or detained in such country on account of obligations contracted towards private individuals, his surrender shall, nevertheless, take place, the injured party retaining his right to prosecute his claims before the competent authority."

Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3, sub-s. 3: "A fugitive criminal who has been accused of some offence within English jurisdiction not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise."

Sect. 10: "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him

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1906, he was committed for trial at the Central Criminal Court in regard to that charge, and on April 4, 1906, was sentenced to twelve months' hard labour. On March 9, 1906, he was committed to His Majesty's prison at Brixton by a metropolitan magistrate under s. 10 of the Extradition Act, 1870, there to await the warrant of a Secretary of State for his surrender, which had been claimed by the Belgian Government for the larceny of which he had been convicted in Belgium, and on the same day the magistrate certified his committal to the Under-Secretary of State for the Home Department. On being liberated on the expiry of the sentence on February 16, 1907, he was immediately re-arrested and detained under the committal order of March 9,

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to prison, but otherwise shall order him to be discharged. In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

"If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit."

Sect. 11: "If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus.

"Upon the expiration of the said fifteen days, or, if a writ of habeas corpus is issued, after the decision of the Court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the Court) to be surrendered to such person as may in his opinion be duly authorized to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

"It shall be lawful for any person to whom such warrant is directed and for the person so authorized as aforesaid to receive, hold in custody, and convey within the jurisdiction of such foreign State the criminal mentioned in the warrant; and if the criminal escapes out of any custody to which he may be delivered on or in pursuance of such warrant, it shall be lawful to retake him in the same manner as any person accused of any crime against the laws of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape."

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VAN DER AUWERA, *Ex parte.*

1906. The question was whether, as the period of five years from the date when the applicant could have appealed against his sentence in Belgium (July 9, 1901) expired on July 9, 1906, he could now be extradited.

Sir J. Lawson Walton, A.-G., and *S. A. T. Rowlatt* shewed cause. Two questions arise. The first question is whether the fact that there has been a lapse of time during which a prescription rule operates in Belgium is any ground for refusing to hand the prisoner over to the Belgian authorities. There is no express provision upon the point either in the Extradition Act, 1870, or in the treaty between the United Kingdom and Belgium for the mutual surrender of fugitive criminals of October 29, 1901. It may, therefore, be that this country is bound to hand him over, and that he must set up the defence of prescription in Belgium. The second question is whether under art. 96 of the Belgian Penal Code the period of prescription has in fact expired.

As to the first question, the prisoner must set up the provision for prescription contained in art. 92 of the Belgian Penal Code in Belgium. As to the second question, his arrest in this country suspended the operation of the prescriptive period under art. 96 of the Belgian Penal Code. The extradition treaty with Belgium of October 29, 1901, includes larceny as an extraditable crime. The only limitation on the right of Belgium to have a criminal handed over to her is where, according to the prescriptive laws of the United Kingdom, the crime ceased to be punishable. There is no provision in the treaty for a crime ceasing to be the subject of extradition owing to prescription in Belgium. Art. 9 of the treaty contemplates the case of a crime losing its criminal character after a lapse of years in the country of refuge. There is no prescription in the United Kingdom, which is the country of refuge, which causes the crime to lose its criminal character at the end of five years; and, therefore, there is a duty to hand him over.

As to the Belgian Penal Code it may be a question for the Belgian Courts to determine whether the term "arrest" in art. 96 applies to an arrest in Belgium as well as to an arrest in this country. That may be a nice question, depending upon the

object with which art. 96 in the Penal Code was inserted; but it is sufficient for this Court to consider that the point is one that could be raised in Belgium, and ought to be raised there by way of defence if it is sought to place the accused upon his trial there, or if it is sought to imprison him there under the conviction which has taken place there. It is a matter for the Belgian Courts, and not for the Courts of the United Kingdom. Although the word "arrest" may be of doubtful application, that is a matter for the Belgian Courts to consider. If the word "arrest" applies to arrest and imprisonment in this country, it is clear that the prescriptive period has not come to an end. The accused is a criminal who has not suffered his punishment, and as there is no prescription in the United Kingdom, there is no reason why he should not be extradited.

R. W. Barnett, in support of the rule. The applicant has only been committed to prison there to await the warrant of the Secretary of State. By s. 11 of the Extradition Act, 1870, when the magistrate has committed a person to prison under s. 10 of the Act of 1870 two duties fall upon him: he must first communicate to the Secretary of State the fact that he has so committed the prisoner, and he must also tell the prisoner that he is entitled to apply for a writ of habeas corpus, and that he will not be deported for fifteen days. The effect of s. 3, sub-s. 3 of the Act of 1870 is simply that the law of England asserts itself against the law of the foreign country. No notice is taken of a request for extradition until the prisoner has served his term of imprisonment in the United Kingdom. Art. 9 of the treaty of 1901 does not contemplate the possibility of Belgium desiring the extradition of a criminal who is no longer punishable there.

If, at the present moment, the prisoner is not punishable in Belgium because the prescriptive time has expired, he is improperly imprisoned in this country. He ought now to be discharged, because the committal order of March 9, 1906, is now of no force, inasmuch as he can no longer be punished for the offence in Belgium. The Secretary of State cannot properly issue his warrant when he is informed that the prisoner can no longer be punished. Art. 96 of the Belgian Penal Code says that the prescription of a sentence shall be interrupted by the "arrest"

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of the condemned. The word "arrestation" must mean arrest by a Belgian officer. But even if "arrestation" means arrest at the instance of the King of the Belgians by an officer of the English law, the arrest in the present case only took place on February 16, 1907, and at that time the period of prescription in Belgium had run. The onus is on the respondent to shew that "arrestation" in art. 96 of the Belgian Penal Code means arrest in England by an officer of the English law for an offence against the English law.

There has been no arrest at the instance of the King of the Belgians. The committal order of March 9, 1906, is on the face of it only to become operative when the term has been served for the offence with which the prisoner was charged in the United Kingdom; and when that term was served the applicant for the first time was detained under that order. The word "arrestation" in s. 96 of the Belgian Penal Code means an arrest by the Belgian authorities for an offence against Belgian law. It is for this Court to decide what the meaning of the word is. If the surrender of the prisoner is delayed under s. 3, sub-s. 3, of the Extradition Act, 1870, until the prescriptive time has run in Belgium, the effect of the order of committal made by the magistrate is destroyed. That, however, is a piece of good fortune for the prisoner, resulting from the fact that in that particular case the English law predominates. As to the contention that the prisoner can apply for relief to the Belgian Court if he is surrendered, it is clear from s. 641 of the Code d'Instruction Criminelle that he cannot appear. His sentence having been prescribed, he is now under the stigma of the sentence, and has no right to go before a tribunal in Belgium.

LORD ALVERSTONE C.J. In my opinion this rule must be discharged. I express no opinion as to what may be the proper view to be taken where proceedings before a magistrate with a view to obtaining an order for committal of the accused to prison, there to await the warrant of the Secretary of State for his surrender, are taken after such a period as to prevent the offence in respect of which the surrender of the accused is claimed being punishable in the foreign country. That point does not arise in this case.

I wish, therefore, to express no opinion as to what would happen if effective proceedings before the magistrate in England had not been taken before the expiration of the Belgian prescriptive period of five years. On March 9, 1906, the metropolitan magistrate made the committal order. The order for committal of March 9, 1906, was rightly made under s. 10 of the Extradition Act, 1870; and if the prisoner had not been undergoing his sentence under his conviction in the United Kingdom, the Secretary of State would, under s. 11 of the Act of 1870, have issued his warrant ordering the surrender of the prisoner to some duly authorized person in order that he might be conveyed to the foreign country. On behalf of the applicant it is contended that, because it is now more than five years from the commencement of the prescriptive period in Belgium, the warrant of the Secretary of State ordering the surrender of the applicant ought not to be issued. The committal order of March 9, 1906, seems to me to be authorized by the express language of the Act of 1870, and terms of the treaty between the United Kingdom and Belgium for the surrender of fugitive criminals dated October 29, 1901. I should not give effect to a technical argument such as that advanced before us on behalf of the applicant unless I were compelled to do so. But having regard to s. 3, sub-s. 3, of the Extradition Act, 1870, and to articles 9 and 11 of the Belgian treaty of October 29, 1901, I think the matter is reasonably clear. Art. 11, in my opinion, shews that the contracting parties have exactly appreciated the position, viz., that the law of the country in which refuge has been taken may have to be enforced before the surrender is made. It is unnecessary to consider the effect of the provisions of the Belgian Penal Code, but speaking for myself, I am not prepared to say that we should consider or determine any minute questions of law with reference to the rights of the surrendered person after his return to Belgium. It is quite plain that there are two possible views as to the meaning of the word "arrestation" in art. 96 of the Belgian Penal Code. That question may be for the Belgian Court to decide, but the point does not arise, in my opinion, in the present case.

I am of opinion that the rule must be discharged upon the ground that there was a valid order for committal on March 9,

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1906, in respect of which the Secretary of State might at the end of fifteen days have issued his warrant for the surrender of the prisoner were it not for the fact that his power to do so was suspended until the punishment inflicted upon the applicant by English law had been undergone.

DARLING J. I agree, having regard to the particular facts, and especially to the dates, in the present case, but I wish especially not to be supposed to decide the point which may possibly arise in future, viz., the meaning of the word "arrestation" in s. 96 of the Belgian Penal Code. On behalf of the respondent it was said that if the applicant presented himself in Belgium and asked to be tried, he, being sentenced par contumace, would have a right to be tried notwithstanding the expiration of five years from the date of his sentence. A great deal might depend upon that fact, if it were not for the date of the warrant of commitment by the metropolitan magistrate, because s. 476 of the Code d'Instruction Criminelle provides that if the accused surrenders himself to prison or is arrested before the expiration of his sentence by prescription, then the judgment given par contumace and the proceedings taken against him shall be at an end. But the applicant has been in England during the whole time; he has not surrendered himself in Belgium, nor has he been arrested by a Belgian officer in Belgium, during the time of the running of the period of prescription. In these circumstances s. 641 of the Code d'Instruction Criminelle applies. That section says that in any case persons condemned by default or par contumace, and whose punishment is prescribed, shall not be allowed to present themselves and to get rid of the defect in their sentence, that is to say, they cannot be allowed to present themselves for trial again to get rid of the effect of the sentence par contumace. The prescriptive time in Belgium would have been completed if the arrest in England does not interrupt it, and if we were not absolutely right about the date of the warrant of commitment by the English magistrate for the English crime that fact would raise a difficulty. If the effect of the arrest of the applicant in England is that under art. 96 of the Belgian Penal Code he would have a right to go before the Belgian Court and say: "I

have been under arrest within the meaning of that article," it is clear that the prescriptive period in Belgium might thereby be interrupted. I think it right to point out that, but for the date of the warrant of committal of the metropolitan magistrate, a difficult matter might have arisen for our consideration. A person might apply in Belgium under s. 476 of the Code d'Instruction Criminelle for a re-trial, and he might thereupon be met by an objection under s. 641 of the Code saying that the prescriptive time from the date of his sentence had run out. He would then, I think, contend, with a great deal of force if he had been under arrest in England, "Now I claim the benefit of s. 96 of the Penal Code. My prescription was interrupted by 'arrestation,' viz., by my arrest in England. I ought to be allowed to rely upon that arrest," because nothing can more certainly prevent a Belgian who wishes to present himself to the Belgian Courts to be tried for a crime which he has committed there, and for which he has been sentenced par contumace, from doing so than an arrest in a foreign country where nobody takes any interest in him, and he is kept in gaol during the whole of the Belgian period of prescription, of which he might wish to avail himself. I think but for one fact occurring, viz., the issue by the magistrate on March 9, 1906, of the warrant of committal, this case might give rise to very difficult questions; and I should not in the least desire to be supposed to have affected to decide any one of them.

A. T. LAWRENCE J. I agree that this rule must be discharged. It is admitted that there was no sufficient lapse of time to afford any exemption from surrender when the order of committal of March 9, 1906, was made. It seems to me that that order of committal has been in force from that time up to the present, it has merely been suspended by the operation of the conviction here, as provided for by the Extradition Act, 1870. Any rights that the applicant may have according to Belgian law he can set up in Belgium, and they will be given their due weight and force.

Rule discharged.

Solicitor for applicant: *E. W. Long.*

Solicitor for respondent: *Solicitor to Treasury.*

J. E. A.

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In re SUMMERS.
Ex parte THE OFFICIAL RECEIVER.

Bankruptcy—Conditional Order of Discharge—Non-fulfilment in part of Condition—Revocation of Order of Discharge—Jurisdiction—The Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 104—*The Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-ss.* 2 (*iv.*), 8—*The Bankruptcy Rules*, 1886—1890, *rr.* 240, 244A; *Appendix, Form* 63A.

When the Court grants a bankrupt a conditional discharge under sub-s. 2 (iv.) of s. 8 of the Bankruptcy Act, 1890, in the terms of Form 63A in the Appendix to the Bankruptcy Rules, 1886—1890, the condition of the discharge is not merely his consenting to judgment being entered against him for the required amount, but his due performance of the judgment by payment of the instalments directed; and if the bankrupt gives the usual consent to judgment but fails without sufficient cause to pay the instalments, the Court has jurisdiction under s. 104 of the Bankruptcy Act, 1883, to revoke the order of discharge.

THIS was an application by the trustee to revoke a conditional order of discharge under these circumstances.

In February, 1905, the debtor was adjudicated bankrupt on a creditor's petition, and the official receiver became the trustee. On August 8, 1905, the debtor applied for his discharge. The official receiver's report stated that the debtor's unsecured liabilities amounted to 7709*l.* 8*s.* 5*d.*, that his assets did not amount to 10*s.* in the pound on the amount of the unsecured liabilities, and that the debtor had contributed to his bankruptcy by (1.) rash and hazardous speculation, and (2.) unjustifiable extravagance in living. Thereupon the Court made the following order in accordance with Form 63A in the Appendix to the General Rules, 1886—1890: "It is ordered that the bankrupt be discharged subject to the following condition to be fulfilled before his discharge takes effect: he shall before the signing of this order, consent to judgment being entered against him in the King's Bench Division of the High Court by the official receiver for the sum of 7709*l.* 8*s.* 5*d.*, being the amount of the debts provable in the bankruptcy which is not satisfied at the date of this order, and 1*l.* 10*s.* 0*d.* costs of judgment. And it is further ordered that the said sum of 7709*l.* 8*s.* 5*d.* be paid at the

rate of 50*l.* per annum payable monthly, the first of such monthly instalments of 4*l.* 3*s.* 4*d.* to be due and paid to the official receiver on the 1st of September, 1905, and thereafter on the 1st day of each month. And it is further ordered that, upon the required consent being given, judgment may be entered against the bankrupt in the King's Bench Division of the High Court for the sum of 7709*l.* 8*s.* 5*d.*, the costs of judgment having been paid to the official receiver." In pursuance of this order, the debtor signed the usual consent, and the official receiver entered up judgment accordingly.

In March, 1906, the official receiver applied to the Court to revoke the conditional order of discharge of August 8, 1905, on the ground that the debtor had not paid any instalment under the order. Thereupon the debtor paid up all the arrears of the instalments to that date, and no order was made on the application.

In August, 1906, the official receiver again applied to the Court to revoke the conditional order of discharge on the ground that the debtor had made no payments since March, 1906, and the Court made an order directing the debtor to pay the arrears within fourteen days. This order was not complied with, nor did the debtor make any further payments whatever, and in December, 1906, the official receiver again applied to the Court to revoke the conditional order of discharge. The registrar considered that the application raised a novel point of some practical importance, and referred the matter to the judge. It appeared that at the date of the order of discharge the bankrupt was in receipt of a salary of 300*l.* per annum.

E. W. Hansell, for the official receiver. Sect. 104 of the Bankruptcy Act, 1883, is the same as s. 71 of the Bankruptcy Act, 1869, and under those sections it has been held that the Court has the widest power to rescind or vary any order: *In re Tobias* (1); *In re Wike*. (2) The debtor by getting this order has been in the position of a discharged bankrupt, and he has broken the condition on which he obtained it. The consenting to judgment and the payment by instalments are both parts of the condition.

(1) [1891] 1 Q. B. 463. (2) (1874) L. R. 9 Ch. 667.

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[BIGHAM J. Is there any reason why the debtor should not be brought before me on a judgment summons, and if I thought he had the means to pay and was recalcitrant, I could not adjudicate him a bankrupt?]

That may be one remedy, but this is a conditional order of discharge, and the purpose of the present application is not to compel payment of the instalments, but to affect the status of the debtor by varying or rescinding the order and imposing some other terms under s. 8. Probably a period of suspension would meet the case. The registrar was of opinion that it was a proper case for revocation of the discharge if he had the power.

Tindale Davis, for the debtor. There is no jurisdiction to revoke this order. It is clear that the order contains two distinct conditions. One is the consenting to judgment, and if that consent is not given within one month, the Court can under r. 240 of the Bankruptcy Rules revoke the discharge. Further, sub-s. 8 of s. 8 of the Act of 1890 and r. 244A of the Bankruptcy Rules give an express power to revoke the discharge in certain cases, which do not apply here. Under sub-s. 2 (iv.) of s. 8 the Court required this debtor as the condition of his discharge to consent to judgment being entered against him by the official receiver for the balance of the debts provable in the bankruptcy. That condition was fulfilled, and the present application is not made under r. 244A. It is submitted, therefore, that where the Acts and the rules give an express power to revoke a discharge in certain cases there is no implied power of revocation in a case for which no provision is made by the Acts or the rules. If this debtor were to pay the instalments for fifty years, and then cease payment, the official receiver, according to his contention, would be entitled to have the discharge revoked. It is submitted that the Legislature never contemplated such a state of things, and that the general power given by s. 104 ought not to be applied to this case.

BIGHAM J. The question I have to determine in this case is whether the Court has jurisdiction in any circumstances to

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revoke an order of discharge which has been granted under sub-s. 2 (iv.) of s. 8 of the Bankruptcy Act of 1890. I am clearly of opinion that there is jurisdiction. The Bankruptcy Act, 1883, s. 104, provides that "Every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction." This order of discharge was made by Mr. Registrar Linklater and comes clearly within the words of that section. It is, therefore, an order that may be reviewed, rescinded, or varied. Then under what circumstances may it be rescinded or varied? Sub-s. 2 (iv.) of s. 8 of the Act of 1890 says that the Court may require the bankrupt as a condition of his discharge to consent to judgment being entered against him for the balance of the debts provable under the bankruptcy. Now, the bankrupt in this case has consented to such a judgment, and it is urged on his behalf that, having consented to the judgment which is the condition upon which he gets his order of discharge, there is an end of the matter, and that it is not possible to rescind or review the order. I do not, however, think that that is the whole effect of sub-s. 2 (iv.). The condition, in my opinion, is greater than a mere consenting to a judgment. It is consenting to a judgment to be paid in a certain way. It is to be paid out of the "future earnings or after-acquired property of the bankrupt in such manner and subject to such conditions as the Court may direct." The Court in this case has imposed conditions as to the manner in which the judgment is to be satisfied. It is to be satisfied by the payment of certain monthly instalments, at the rate of 4*l.* 3*s.* 4*d.* a month and amounting to 50*l.* a year. The Act says that the official receiver or the trustee can only require those instalments to be paid out of the "future earnings or after-acquired property of the bankrupt." The condition, instead of being a mere condition that the debtor shall consent to judgment, is, in my opinion, a condition that he shall also perform the conditions imposed upon him by the Court as to payment. It is not the mere consenting to the judgment which is the condition of the discharge, it is the consenting to the judgment and the performance of the judgment as well; and if the registrar be satisfied that this debtor has

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been in receipt of earnings or of after-acquired property within the meaning of the statute, and has not devoted them to the purpose to which they ought to be applied, then, I think, he is entitled to say that the condition of the discharge has not been performed and that the discharge shall be revoked. I need say no more than that I think there is jurisdiction to revoke the order, and it may very well be that in this case circumstances have arisen—I do not say that they have, because I do not know sufficient about the case—which will justify the registrar in exercising his jurisdiction to revoke. The matter will be remitted to the registrar to be dealt with on its merits.

Solicitors: *The Solicitor to the Board of Trade; Roberts & Wrightson.*

H. L. F.

C. A.

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April 26.

[IN THE COURT OF APPEAL.]

In re SAUMAREZ. *Ex parte* SALAMAN.

Bankruptcy—Deed of Arrangement—Non-registration—Validity—Assignment for the Benefit of certain named Creditors only—Deeds of Arrangement Act, 1887 (50 & 51 *Vict. c.* 57), *s.* 4, *sub-s.* 2; *s.* 19.

An assignment by a debtor for the benefit of certain named creditors only without any option to the remaining creditors to assent to the deed is not a deed of arrangement for the benefit of the creditors generally within the Deeds of Arrangement Act, 1887, and consequently does not require registration.

Dictum of Vaughan Williams L.J. in *Hedges* v. *Preston*, (1899) 80 L. T. 847, explained and distinguished.

THIS was a motion by the trustee of the bankrupt for a declaration that a memorandum dated October 1, 1905, and signed by the bankrupt, and an indenture dated January 15, 1906, and made between the bankrupt and the respondents, A. B. Blythe and G. A. Wingfield, were void as against the trustee on

the ground that they had not been registered under the Deeds of Arrangement Act, 1887. (1)

On October 1, 1905, the bankrupt, being in difficulties, called a meeting of certain of his creditors who were pressing for payment, and by a memorandum of that date, signed by the bankrupt and the creditors in question, eleven in number, these creditors agreed not to take any further proceedings in respect of their claims against the bankrupt upon condition that 4*s.* in the pound should be paid to them on or before October 12, 1905, and that the bankrupt should transfer to the respondents, as trustees for such creditors, his interest in the promotion of a certain gold mining company, and certain reversionary interests to which he was entitled, to be realized or otherwise dealt with as should be resolved upon by a majority of such creditors by a resolution in writing signed by such majority.

On January 15, 1906, the composition having been duly paid in the meantime, a deed was executed by the bankrupt and the respondents whereby the bankrupt assigned to the respondents the property referred to in the memorandum in trust for the creditors mentioned in the fifth schedule to the deed, being the creditors who signed the memorandum, to be realized or otherwise dealt with in the manner provided by the memorandum; and the deed contained a proviso for the reassignment to the bankrupt of any property which should not have been realized or otherwise dealt with in pursuance of the resolution of the majority of the scheduled creditors as soon as such creditors should have received 20*s.* in the pound.

Neither the memorandum nor the assignment was registered under the Deeds of Arrangement Act, 1887.

(1) The material provisions of the Deeds of Arrangement Act, 1887, were as follows:—

Sect. 4, sub-s. (2): "A deed of arrangement to which this Act applies shall include any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say:—

"(*a*) An assignment of property."

Sect. 19: "In this Act, unless the context otherwise requires,—

"'Creditors generally' includes all creditors who may assent or take the benefit of a deed of arrangement."

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On September 20, 1906, a receiving order was made against the bankrupt, and adjudication followed on September 24, and on October 12 a trustee was appointed.

The total amount due to the scheduled creditors as appearing from the sums set opposite their names was 6056*l.* odd, and it appeared from the bankrupt's statement of affairs that, in addition to these creditors, there were in existence at the date of the assignment four unsecured creditors of the bankrupt, whose claims amounted in the aggregate to 60*l.*

The bankrupt, however, stated in an affidavit filed in opposition to the motion that there were, in addition to the creditors mentioned in the deed, fifteen unsecured creditors whose names he mentioned, and that their total claims amounted to 6500*l.*, and he also stated that the total amount due to the scheduled creditors was in fact not 6056*l.*, but only 4756*l.*

Horridge, K.C., and *Hansell*, for the trustee in bankruptcy.

Gore-Browne, K.C., and *Van Neck*, for the trustees of the deed.

BIGHAM J. I think that this application fails. The question is whether the deed of January 15, 1906, which follows the memorandum of October 1, 1905, is a deed of arrangement within the meaning of the Deeds of Arrangement Act, 1887. To answer that question I must look first at the deed and then at the words of the Act. This purports to be a deed between the debtor and certain named creditors. Their names are to be found in a schedule appended to the deed. There are eleven of them altogether, and their claims amount to about 6000*l.* It is agreed that these are not by any means all the creditors of the bankrupt, and the evidence seems to shew that they were certain creditors who were at the time pressing for payment of their debts. What did the bankrupt do? He assigned to two gentlemen certain property—whether it comprised all the property or not I do not know—upon trust for these particular creditors. I have no right to put upon that deed any other interpretation than that which the words bear, viz., that it is an assignment for the benefit of certain named individuals and no one else. No

one could come in and claim the benefit of that assignment except the persons named in the schedule. Now I turn to the Act of Parliament to see whether such an assignment comes within the words of the Act. Sect. 4, sub-s. 2, says: "A deed of arrangement to which this Act applies shall include any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally"; and s. 19 defines "creditors generally" as including "all creditors who may assent or take the benefit of a deed of arrangement." It would be a perversion of the meaning of the Act to say that a deed which on its face is for the benefit of certain named persons, and not for any class at all, could be described as for the benefit of the creditors generally. The Act contemplates a deed which includes all creditors who choose to assent to it: that is to say, any creditor who chooses to come in and say "This is a deed which purports to be for the benefit of creditors generally, and I desire to assent," will get the benefit of it. It may be that my decision defeats the object of the Act, but with that I have nothing to do. Unless the deed comes fairly within the Act I cannot put it there. The application must be refused.

The trustee in bankruptcy appealed.

Horridge, K.C., and *Hansell*, for the trustee in bankruptcy. A deed of arrangement for the benefit of some creditors only falls within the Deeds of Arrangement Act, 1887, and requires registration: *Hedges* v. *Preston* (1), per Vaughan Williams L.J. If s. 4 stood alone it might be supposed that the Act intended only to apply to a deed for the benefit of all, or substantially all, the creditors, but the definition clause, s. 19, enlarges the meaning to be given to "creditors generally," and says that it includes any body of creditors who come in and take the benefit of a deed of arrangement. The word "include" is frequently used in interpretation clauses to enlarge the meaning of expressions occurring in the body of the Act: *Dilworth* v. *Commissioners of Stamps* (2); and it is used in that sense in s. 19, so that the expression "creditors generally" as used in the Act is not

(1) 80 L. T. 847. (2) [1899] A. C. 99, 105.

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limited to its natural meaning. Bigham J. has given the go-by to the definition clause altogether. The object of the Legislature was to ensure that publicity should be given to deeds of arrangement, and, once a deed is a deed of arrangement, the mischief arising from non-registration is equally great, whether the deed is for the benefit of all the creditors or of a favoured few.

Gore-Browne, K.C., and *Van Neck*, for the trustees of the deed. It is conceded that, taking s. 4 alone, "creditors generally" means all the creditors. Then what meaning is to be given to the definition clause? It is submitted that that must have relation to what was the well-known practice of conveyancers at the time of the passing of the Act in framing deeds of arrangement, according to which the deed was made for the benefit of a certain number of named creditors and all other creditors acceding thereto within a given time: Bythewood and Jarman's Conveyancing, vol. 2, p. 490; *In re Batten*. (1) But for the definition clause it might have been argued that that was not a deed for the benefit of the creditors generally, because some of the creditors might not come in and take the benefit of it within the stipulated time; but s. 19 says "'creditors generally' includes all creditors who *may* assent"—not all who have in fact assented, but all who have the power to assent, whether they do assent or not.

The dictum of Vaughan Williams L.J. in *Hedges* v. *Preston* (2) is really inconsistent with the views of the other members of the Court. The fact that this is a penal statute is a reason for construing it with the greater strictness, because a man is not to be deprived of his common law rights unless the Legislature says so in plain terms. But, assuming the dictum to be right, it does not cover this case because he says that the creditors must be dealt with collectively. This deed deals with eleven creditors individually; they were not a class of creditors in any sense, and if this is a deed of arrangement within the Act it would follow that a deed made between the debtor and two of his creditors must be equally within it; but unless there is a general compounding with the creditors there is no reason why the arrangement should not be made privately.

(1) (1889) 22 Q. B. D. 685. (2) 80 L. T. 847.

Under s. 4, sub-s. 1, of the Bankruptcy Act, 1883, which is in pari materia with s. 4, sub-s. 2, of the Act of 1887, it has been held that an assignment by a debtor for a particular class of creditors is not an assignment "for the benefit of his creditors generally": *In re Phillips* (1); and the same meaning ought to be given to that expression when it occurs in the Act of 1887.

Hansell, in reply.

COZENS-HARDY M.R. I do not see my way to differ from the decision of Bigham J. in this case. I say so with some regret, for I think that the decision tends to shew a possible omission in the Act of 1887; but it is not for us to deal with that—our duty is limited to construing the Act. This is a deed which contemplated only eleven named creditors. According to the evidence of the bankrupt these creditors were not even a majority in number of the total creditors, and, although the evidence on that point is not as conclusive as it might be, at least this much is certain, that there were a considerable body of creditors outside the deed. It is said that they were not only more numerous, but that their debts were larger. Be that as it may, we have a deed to which no person other than the eleven named persons had any option of assenting, and we have to ask ourselves whether, in the language of the Act of 1887, that is a deed of arrangement for the benefit of the creditors generally. Reading the words of s. 4 alone, it seems to me impossible to say that this deed falls within the section, seeing that it is a deed for the benefit of these eleven specified creditors, and that no one else had any right or power to assent to or claim any benefit under it. Then it is said that there is something in the definition clause, s. 19, which almost entirely changes the meaning and effect of s. 4. These are the words, "'Creditors generally' includes all creditors who may assent or take the benefit of a deed of arrangement." In the first place, the deed of arrangement has to be one which is for the benefit of creditors generally, and the definition clause seems to me to mean no more than this, that a deed which in one sense might not be for the benefit of all the creditors, because, to take the commonest case, it might fix a limit

(1) [1900] 2 Q. B. 329.

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of time within which the creditors were to come in, may yet be a deed for the benefit of creditors generally, inasmuch as it gives an option to all the creditors to assent and take the benefit of it, although, in the events which have happened, by reason of delay or otherwise, all the creditors did not in fact come in. I cannot see my way to hold that a deed for the benefit of certain specified creditors with no option to the other creditors to come in is a deed for the benefit of creditors generally. Reference has been made to the case of *Hedges* v. *Preston* (1), in which there are some observations of Vaughan Williams L.J. with regard to this Act. I need scarcely say that any observations falling from him on any branch of the bankruptcy law deserve and receive the utmost attention and respect; but when those observations are fairly read it is on the face of them apparent that they were not necessary to the decision of the case, and I am not satisfied that they were really directed to the point with which we have to deal. I do not regard myself as overruling the observations of the Lord Justice, but I do not think that they apply. The appeal must be dismissed.

SIR GORELL BARNES, PRESIDENT. I agree. I have only a very few words to add. The deed in question is admittedly a good deed, unless the Act of 1887 makes it void for want of registration. Therefore the Act is taking away the validity of the deed, and we must look closely at its language to see whether that is really the effect of it. It seems to me that, after the discussion which has taken place, it is clear that if s. 4 stood alone the deed would be left as a good deed, because it was not for the benefit of creditors generally in the ordinary acceptation of the term, but was for the benefit only of certain specified creditors named in the deed. The whole question, therefore, turns upon the meaning of s. 19, which defines the words "creditors generally," used in s. 4, and is said to alter entirely the meaning of those words. That certainly is a very odd way of expressing the view contended for by the appellants in this case, that "creditors generally" is to mean some creditors, which is really the

(1) 80 L. T. 847.

effect of the argument which has been addressed to us to-day, and the argument goes so far as to suggest that the deed would be bad even if entered into between the debtor and three creditors. I say "three," because the deed provides that the property should be dealt with by the majority of the creditors, and if there were only two there might not be a majority. If the Act were intended to go so far as that, or to cover the case of a deed for the benefit of even a considerable number of the creditors, one would certainly expect to find language of a much more emphatic character than that which is used in s. 19. Then one is driven to see whether any meaning can be given to s. 19 extending s. 4 somewhat beyond the effect which it would have if it stood alone. It seems to me that the class of cases to which Mr. Gore-Browne referred is intended to be dealt with by this interpretation clause, and that an effective meaning can be given to that clause by saying that it applies—I do not say exclusively —but applies to cases in which creditors are named in the deed, and it is contemplated that all the rest of the creditors may come in and share the benefit of the deed if they choose. My difficulty in this case, as I have already said, is that if the Act were intended to go so far as is contended for by the appellants in this case, one would expect to find language which made that clear.

KENNEDY L.J. I have come to the same conclusion, and, speaking for myself, I think that the correctness of the judgment is fairly clear, and that the case does not admit of much argument. Sect. 4 of the Act uses the expression "creditors generally." Really, to begin with, a rather startling result is suggested by the appellants, that "creditors generally" in s. 4 is not to be read in the way in which it would be read in the Bankruptcy Act, 1883, and it is said that this is so because of the definition clause in the Act of 1887 (s. 19), which, it is suggested, actually extends the meaning of s. 4. I should be very slow to construe an Act of Parliament in a way which gives a different meaning to an expression in the definition clause from that which it has in the earlier part of the Act, and I should also be very slow to give a different meaning to an expression in the Act of 1887 from that

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which the same expression has been held to have in the Bankruptcy Act, 1883, which the Act of 1887 supplements. As I understand definition clauses, they are meant to prevent the possibility of its being said that an expression used in the body of the Act itself does not include something which it was intended to include. It is conceivable that cases might arise in which it might be said that the phrase "creditors generally" excluded something which those who framed the Act intended to include. Except in that limited sense, to my mind you cannot expand or alter the terms of s. 4 by s. 19. Sect. 4 says that "a deed of arrangement to which this Act applies shall include any of the following instruments made by the debtor for the benefit of his creditors generally"; and then it specifies a number of instruments which might possibly be said by reason of their form or substance, such, for example, as an inspectorship deed, not to be termed deeds of arrangement. I should have thought that "creditors generally" was a fairly simple phrase. I think that s. 19 was intended to prevent any doubt as to the inclusion of such cases as those suggested by Mr. Gore-Browne, where there was a limitation on the face of the deed as to those who might come in and take advantage of the deed—as, for example, where its benefit was confined to those creditors who came in within a period of six months, or to such creditors as might signify their assent in writing. It might have been argued, but for the definition clause, that because some of the creditors might not choose to comply or had not complied with the requirements of the deed as to time or as to the form of the assent, and were consequently not entitled to share in the benefits of the deed, therefore the deed was not within the Act. But a deed of arrangement is a deed within the purview of the Act, for the benefit of creditors generally, if the deed is one by which the debtor offers to make a settlement with the general body of his creditors and invites all to come in and share the benefits of the deed. In such a case all creditors may assent or take the benefit of the deed, that is, are in a position to become beneficiaries under the deed, whether they actually do so or not. If it is a deed which in its inception and purpose was available to the creditors as a body, then it is within the

Act even though there may be some terms in it as to time or manner of signifying assent thereto and although all the creditors do not in fact take advantage of it. It is said, however, that there is something in the judgment of Vaughan Williams L.J. in *Hedges* v. *Preston* (1) which is at variance with that view. I cannot follow that contention. In the first place, it seems to me that he was not comparing the Bankruptcy Act, 1883, with the Deeds of Arrangement Act, 1887. He happened, with his wide knowledge of the law of bankruptcy, to refer back to the Bankruptcy Act of 1861, and he says that the scheme of the Deeds of Arrangement Act is quite different. "Its object," he says, "is not to bind a minority of creditors to accept a deed of arrangement instead of bankruptcy. The object of the Act is that unless publicity is given to a deed of arrangement by registration the deed shall be void." Then he goes on: "In dealing with such an Act of Parliament I should be slow to hold that a deed was exempt from the necessity for that publicity because it was not for the benefit of all the creditors. Looking at the Act, there is a provision in the interpretation clause (s. 19) which points strongly in that direction. Sect. 19 provides that 'in this Act, unless the context otherwise requires, "creditors generally" includes all creditors who may assent or take the benefit of a deed of arrangement.' That is the very expression used in s. 4. It seems to me that, having regard to that definition, if the deed deals with the creditors collectively and not individually and is a deed for the benefit of the creditors as a class, the deed is one which comes within the Act." I think he is giving to the words "creditors generally" exactly the same meaning as is given to them in the definition clause, according to the construction we have put upon it. I doubt very much whether the Lord Justice meant to suggest, as has been contended by the appellants, that if you find, as in this case, a deed which instead of dealing with creditors collectively deals in terms with particular creditors, and which never contemplates anybody else coming in, he would be prepared to hold that such a deed was within the Act. In construing an Act of Parliament one must construe the language with precision, and certainly, as this Act is using the

(1) 80 L. T. 847.

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same language as the Bankruptcy Act, 1883, it would, in my opinion, be quite impossible consistently with reason to treat as a deed for the benefit of creditors generally a deed which creditors other than certain named creditors in the deed cannot assent to and cannot take the benefit of.

Appeal dismissed.

Solicitors: *Spyer & Sons; Wingfield & Blew.*

H. B. H.

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[IN THE COURT OF APPEAL.]

In re BUTTON.

Ex parte HAVISIDE.

Bankruptcy—Proof—Goods in Order and Disposition of Bankrupt—Right of Proof by true Owner for Value of Goods—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-ss.* 3, 8; *s.* 44 (*iii.*).

At the date of the bankruptcy of the debtor, an art dealer, there were in his possession goods which had been entrusted to him by a customer to sell for the customer at the best prices he could get for them, and by an order made in the bankruptcy it was adjudged that these goods passed to the trustee as being in the order and disposition of the bankrupt within the reputed ownership clause, s. 44, sub-s. 2 (iii.), of the Bankruptcy Act, 1883:—

Held, that the customer was entitled to prove in the bankruptcy for the value of the goods.

Decision of Bigham J., [1907] 1 K. B. 397, reversed.

APPEAL from a decision of Bigham J. (1)

Prior to his bankruptcy the debtor carried on the business of a dealer in antiques and works of art, and the appellant Haviside was a collector of such goods. Haviside from time to time purchased goods from the debtor, for which he paid, and which he left in the custody of the debtor until he should require them. Haviside also purchased similar goods from other art dealers, for which he paid, and which he also placed with the debtor for safe custody. Ultimately Haviside gave up collecting, and instructed the debtor to sell the whole of his collection at the best prices he

(1) [1907] 1 K. B. 397.

could obtain for them. The total value of the goods was about 758*l.*

On March 10, 1906 the debtor presented his own petition, and on the same day a receiving order was made against him, and on March 27 he was adjudicated bankrupt and a trustee was appointed. At the commencement of the bankruptcy, which was the date of the receiving order, all the goods of Haviside were still in the possession of the debtor; and on June 25 the Court, on the application of the trustee, held that all these goods passed to the trustee and formed part of the property of the bankrupt divisible amongst his creditors by virtue of s. 44, sub-s. 2 (iii.), of the Bankruptcy Act, 1883.

In August Haviside lodged a proof against the bankrupt's estate for 758*l.* 16*s.* 6*d.*, which he claimed as the value of his goods which were entrusted by him to the debtor for sale on his behalf, but which remained unsold at the date of the receiving order and had not been returned to him, and alternatively as damages for breach by the bankrupt of an implied contract that he would either sell the goods and account for the proceeds or return them.

The trustee rejected the proof on (amongst others) the following grounds:—

"3. That the said goods have been adjudged to be the property of the trustee by order of the Honourable Mr. Justice Bigham dated the 25th day of June, 1906, and made on a motion by me as the trustee against you.

"4. That there was no breach by the bankrupt of any contract express or implied.

"5. That there was no demand $\frac{\text{and}}{\text{or}}$ refusal on or by the bankrupt to return the said goods to you.

"6. That any loss or damage you may have sustained does not arise out of any breach of contract by the bankrupt.

"7. That any such loss or damage arises (*a*) from the provisions of the bankruptcy law (*b*) by your own act or default in consenting to the goods being in the order or disposition of the bankrupt."

Against this rejection of his proof Haviside appealed.

Bigham J. affirmed the rejection of the proof.

Haviside appealed from this decision.

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Herbert Reed, K.C., and *F. Mellor*, for Haviside. The question is whether the claimant whose goods have been taken under the reputed ownership clause, s. 44 (iii.), of the Bankruptcy Act, 1883, can prove for the loss he has sustained. First, the bailee who accepts an agency such as this agrees to sell, and, if he cannot sell, to redeliver. Secondly, the bankruptcy does not put an end to the obligation, but converts the remedy into proof. Thirdly, s. 37 of the Bankruptcy Act, 1883, which relates to proof of debts, comprises all possible claims except those which are specifically excluded or are held incapable of proof. There is no direct authority on the point, but the practice of admitting the real owner as creditor in cases of reputed ownership is recognized as existing in Christian's Bankrupt Law, 2nd ed. (1818), vol. 1, p. 214. It is true that the learned author impeaches the validity of the practice except in cases where an action of debt or assumpsit could have been brought against the bankrupt, but his reasoning is founded on the restrictions on the right of proof existing under the bankruptcy law then in force—a ground which no longer applies. Again, in Montagu and Ayrton's Bankrupt Law, 2nd ed. (1844), vol. 1, p. 290, it is stated, "If goods for which a vendee has paid are left in the order and disposition of the vendor, so as to be distributable by the Statute of James, the vendee may prove their value"; and *Joy* v. *Campbell* (1) and *Utterson* v. *Vernon* (2) are cited in support of that proposition. So that there also the practice is recognized, at any rate under some circumstances. The obligation to return the goods unless sold existed at the date of the receiving order, and the owner of the goods claims to prove for the breach of that obligation. That obligation was not extinguished by the bankruptcy, and the fact that the inability of the bankrupt to perform that obligation arose after the bankruptcy is not an answer to the claim. The bankrupt, by presenting his petition, has put it out of his power to return the goods, and the owner is entitled to recover damages for breach of the terms of the bailment. The effect of the reputed ownership clause is merely to take the property itself to be dealt with as the property of the bankrupt, leaving the real owner to

(1) (1804) 1 Sch. & Lef. 328, 338. (2) (1790) 3 T. R. 539, 548.

prove for the value. As Lord Redesdale says in *Joy* v. *Campbell* (1), it does not effect a forfeiture of the property.

[VAUGHAN WILLIAMS L.J. Eden's Bankrupt Law, 3rd ed. (1832), p. 270, shews that the only mode of depriving the true owner of the goods under the then existing law was by a sale by the Commissioners.]

It may be said that under s. 55 of the Bankruptcy Act, the disclaimer section, any person injured by the operation of the section is allowed a right of proof, and that as no right of proof is expressly given in the present case no right was intended; but the mere omission to express the reservation of the right in the one case does not imply that no reservation was intended. The claimant relies on the general principle that, where one person's goods are lawfully seized to pay the debt of another, the owner of the goods is entitled to an indemnity: *Edmunds* v. *Wallingford*. (2)

[BUCKLEY L.J. Suppose a surplus and the goods were not sold, could the debtor keep them?]

If there is here no provable debt, there might be some question whether the goods in specie would revert to the true owner or belong to the debtor. It is submitted that they would belong to the debtor, but the object of the statute is to embrace every kind of claim and convert it into proof, so that the question does not arise. If there is no provable debt the bankrupt is left exposed to an action for breach of the obligation to return the goods.

[BUCKLEY L.J. It may be said that the goods have been taken away by the Act of Parliament, and that, therefore, there is no breach.]

Where goods which were purchased and paid for remained in the hands of the vendor and were taken under the reputed ownership clause, Lord Redesdale, in *Joy* v. *Campbell* (1), treated it as a case of non-delivery. The reasoning of Lord Redesdale's judgment involves that there would be a right of proof for the value of goods of which the true owner has been deprived by the operation of the reputed ownership clause but for the restrictions as to proof under the then existing bankruptcy law.

(1) 1 Sch. & Lef. 328, 338. (2) (1885) 14 Q. B. D. 811.

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Those restrictions have since been removed. It follows that there is right of proof in this case.

Hansell, for the trustee. No doubt in many cases where a person is deprived of his property by the operation of the reputed ownership clause he is allowed a right of proof, as, for example, in the case of a bill of sale holder, but that is by reason of the antecedent debt. No proof is allowed for a consequence which the law has imposed, and which is not the result of any act or default by the debtor. In *Joy* v. *Campbell* (1) Lord Redesdale was dealing with the right to prove by reason of the vendee never having had the goods which he had bought and paid for. That is a different case from the present, because here the sole ground of the claim is the loss of the goods. It is said that the debtor by presenting his own petition committed a breach of the contract of bailment, inasmuch as he must have known what the effect of his act would be; but that argument is untenable, first, because the law draws no distinction between a debtor's petition and a creditor's petition, and, secondly, because there might have been an antecedent act of bankruptcy, and it is only the accident of this case that there is no relation back. Then the question remains whether in the contemplation of the Bankruptcy Act it is possible for a person who, apart from the operation of the reputed ownership clause, is not a creditor to prove for the loss he has sustained by the removal of the goods by virtue of the Act. These goods were deposited with the bankrupt upon a contract of sale and return. That means that the bailee must return the goods on default of sale on demand by the owner. Until demand there was no breach of the terms of the bailment. Whether the claim to prove is put as a claim for the value of the goods, or as a claim for damages for breach of the contract of bailment, the goods and the right to demand their return are taken away, first, by the statute, and, secondly, by the act or default of the claimant himself (*a*) in having unconscientiously left the goods in possession of the bankrupt, so that he could obtain a false credit upon them, and (*b*) in not having demanded the return of the goods, which would have done away with any question of reputed ownership. The authorities establish that,

(1) 1 Sch. & Lef. 328.

in order to bring in the doctrine of reputed ownership, the true owner must have unconscientiously permitted the goods to remain in the order and disposition of the bankrupt: *Joy* v. *Campbell* (1); *In re Watson & Co.* (2) The effect of the Act is that certain property which is not the property of the bankrupt is to be deemed to be his property for the purpose of division amongst his creditors. The true owner loses all rights in the goods so long as the bankruptcy is subsisting, and to that extent, and to that extent only, he is deprived of his goods. If this is a claim for damages by reason of the operation of the statute, it is important to observe that in two cases where the Act takes away a right it gives a right of proof. The first is the case where any person is injured by the operation of the disclaimer of onerous property allowed by the Act (s. 55, sub-s. 7), and the second is where the Act cuts down the landlord's right of distress (s. 42, sub-s. 1). But the Act gives no right of proof for any loss arising from the operation of the reputed ownership clause, and in the absence of express direction there can be no proof in respect of a loss arising from an Act of Parliament. Sect. 45 deprives an execution creditor of the benefit of his execution in certain cases, yet he still has a right of proof, but that is because he is a creditor, and the only effect of the section is to take away his security and convert him from a secured creditor into an unsecured creditor.

Herbert Reed, K.C., in reply, referred to Cooke's Bankrupt Laws, 8th ed. (1823), vol. 1, p. 343.

Cur. adv. vult.

March 26. COZENS-HARDY M.R. I have had the opportunity of reading the judgment about to be delivered by Vaughan Williams L.J., and I entirely concur in it and do not desire to add anything to it.

VAUGHAN WILLIAMS L.J. I think this case of great difficulty. An order was made that certain goods were in the order and disposition of the bankrupt, Henry Button, and passed to the trustee of the property of the bankrupt divisible amongst his creditors by s. 44, sub-s. 2 (iii.), as being goods in the possession,

(1) 1 Sch. & Lef. 328. (2) [1904] 2 K. B. 753.

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order, or disposition of the bankrupt at the commencement of the bankruptcy by the consent and permission of the true owner, Tom Haviside. Haviside presented a proof in bankruptcy, claiming—(*a*) the value of the goods, 758*l.* 16*s.* 6*d.*; (*b*) alternatively the said sum as damages for the breach by the bankrupt of an implied contract that he would either sell the goods for the claimant and account for the proceeds, or would return them. That proof was rejected by the trustee on the ground—(1.) that there was no breach by the bankrupt of any contract, express or implied, with the claimant; (2.) that there was no demand $\frac{\text{and}}{\text{or}}$ refusal on or by the bankrupt to return the goods to the claimant; (3.) that any loss or damage the claimant might have sustained did not arise out of any breach of contract by the bankrupt; (4.) that any such loss or damage arose (*a*) from the provisions of the bankruptcy law, (*b*) by the claimant's own act or default in consenting to the goods being in the order or disposition of the bankrupt. Haviside appealed against this rejection by the trustee, and Bigham J. dismissed the appeal. The learned judge says (1): "It is now suggested that by presenting his own petition the bankrupt wrongfully terminated the contract of bailment and so gave to Mr. Haviside a right of proof for damages within the meaning of s. 37 of the Act. It is also further contended that to reject this proof would be to violate a well-known principle of law that, where one man's goods are lawfully taken to satisfy another man's debt, the owner of the goods shall have a remedy against the debtor for an indemnity." Bigham J. then says: "There is, in my opinion, nothing in either of these contentions." As to the first of these contentions I agree. The presentation by the bankrupt of his own petition was not an abuse of the process of the Court, or in any way wrongful: see *Ex parte Painter* (2); *Ex parte Hewitt.* (3) As to the second contention on behalf of Mr. Haviside, there is much more reason to be urged in support of it. Under all the Bankruptcy Acts down to the Act of 1869 goods and chattels in the reputed ownership of the bankrupt did not pass to his assignees by the adjudication. In order to divest the true owner's property

(1) [1907] 1 K. B. 397, at p. 401. (2) [1895] 1 Q. B. 85.
(3) (1862) 31 L. J. (Bk.) 83.

in such goods the Court of Bankruptcy had to make an order to sell and dispose of them: *Heslop* v. *Baker*. (1) Under the Act of 1869, s. 15, it is different; goods in the reputed ownership of the bankrupt are declared to be property of the bankrupt divisible amongst his creditors. But in practice the trustee always obtains an order declaring that goods passed to the trustee and form part of the property divisible by the bankrupt amongst his creditors as being in the bankrupt's reputed ownership. The importance of this difference is this, that under the old law there clearly could be no proof, because proof and the certificate of the bankrupt discharging him from liability in respect of provable claims were confined to claims in existence at the commencement of the bankruptcy, and no claim could arise until the order for sale. This accounts for the absence of authority in the reports for the proposition that the person who suffered by the order for sale had a right of proof against the bankrupt's estate.

I will now deal with such authorities as there are. I do not think they come to much. They nearly all relate, not to cases of damage for a breach of the contract of bailment, but to cases where there was a debt which had arisen in respect of the goods declared to be the subject of the reputed ownership section, and thus liable to be sold for the benefit of the creditors. The case of a purchaser who had paid for goods, but left them in the hands of the vendor, is one case. The case of a mortgagee who left the goods which were his security in the hands of the mortgagor is another. This prevents the application of the passage cited from Montagu and Ayrton's Bankrupt Law, 2nd ed. p. 290. The passage in Cooke's Bankrupt Laws, 8th ed. p. 343, is more relevant. It says: "The statute Jac. 1, c. 19, relating to property by possession, makes the reputed ownership as real for the benefit of creditors in general, the persons' own misbehaviour depriving them of the benefit of the conveyance, though made for good consideration, and they are reduced to the same situation as other creditors." That does not go very far. The passage from *Joy* v. *Campbell* (2) cited by Mr. Christian upon p. 214 of his 2nd edition is more to the point. It says: "And I here would observe that the effect of this law is not a forfeiture of the

(1) (1851) 6 Ex. 740. (2) 1 Sch. & Lef. 338.

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property." It is true that he is speaking of the case of a purchaser, but he says the real owner can be admitted as a creditor and prove for the value of it. Mr. Christian differs from this conclusion. The passage does not deal with damages for breach of the bailment. It seems to me, therefore, that we have to deal with the contention on behalf of Mr. Haviside almost independently of authority. The contention can only be supported on the basis of *Exall* v. *Partridge* (1) and *Edmunds* v. *Wallingford* (2), both of which deal with the case where a man's goods are taken for another's debt. Neither authority touches directly the question of reputed ownership, but I think that the principle would certainly apply if it were not for the contention that any such loss or damage arises from the creditor's own act or default in consenting to the goods being in the order and disposition of the bankrupt. There is no express authority on this point, and I am inclined to think that the severity of the doctrine of reputed ownership may, in the absence of evidence to the contrary, be mitigated by allowing him to prove for the damage which he has sustained by reason of his goods not being returned to him as they should have been according to the contract of bailment. I think, therefore, that this appeal should be allowed.

BUCKLEY L.J. On the 10th of March, 1906, when the debtor presented his petition, there were in his possession, order and disposition certain goods which were the goods, not of the debtor but of the claimant, but which, it has been decided, were in the debtor's order and disposition within s. 44 (iii.) of the Bankruptcy Act. The language of s. 44 is that the property of the bankrupt divisible amongst his creditors shall comprise goods such as these which were not his property. The fair meaning of this language, I think, is that for the purposes of the bankruptcy goods which are not the debtor's property shall be dealt with as if they were the debtor's property. If there had been no bankruptcy, the right of the owner of the goods would have been to recover the goods if he could, and if not, then to have damages for being deprived

(1) (1799) 8 T. R. 308. (2) 14 Q. B. D. 811, at p. 814.

of them. For the purposes of the bankruptcy the statute deprives the true owner of his goods, but I do not think it follows that it deprives him of remedy for that loss which follows from the statute. In my judgment the statute takes the goods away from the true owner, not for all purposes, but for the purposes of the bankruptcy (so that, for instance, if there resulted a surplus for the debtor after all his debts were paid and these goods still remained intact, then, as between the true owner and the debtor, the former, and not the latter, would be entitled); and, secondly, the statute does not take away from the true owner (who ex concessis is for the purposes of the bankruptcy deprived of his goods) all remedy for the loss of his goods.

If the appellant is right in saying that he is entitled to prove, the result no doubt is that the creditors in the bankruptcy get the goods, but upon the terms that they shall pay for them in the sense that there shall be admitted to proof and rank with them a claim by the true owner of the goods for the loss which he has sustained. But this is a result from which I do not shrink if I find that, as between the true owner and the debtor, that which has happened is such as to give rise to a liability arising by reason of an obligation incurred before the date of the receiving order.

It is remarkable how bare this question is of authority. Such authorities as exist seem to me in favour of the right of proof. The words of Lord Redesdale in *Joy* v. *Campbell* (1), "If a man were to purchase goods and pay for them, and permitted them to remain in the hands of the seller, who became bankrupt, he would be a creditor to the amount of the money he paid for the purchase," can, I think, mean only that he would be entitled to a right of proof. In the case put there would not have been a total failure of consideration, and there would be no right to the return of the money on that footing. The passages in Christian's Bankrupt Law, 2nd ed. (1818), vol. 1, p. 214; Montagu and Ayrton's Bankrupt Law, 2nd ed. (1844), vol. 1, p. 290; and Cooke's Bankrupt Laws, 8th ed. (1823), p. 343, are, so far as they go, expressions of opinion of learned text-writers in the same direction. Where the goods of a stranger on the premises

(1) 1 Sch. & Lef. 338.

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of a lessee are distrained for rent, and the stranger is obliged to pay the rent to redeem them, he may maintain assumpsit against the lessee: *Exall* v. *Partridge*. (1) "Speaking generally," said Lindley L.J. in *Edmunds* v. *Wallingford* (2), "and excluding exceptional cases, where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor." The analogy of these cases is, in my opinion, very close to the present. At the date of the bankruptcy the debtor was under such obligations as resulted from the contract of bailment. It is true that down to the moment of the presentation of his petition no right of action had arisen, but there was, as it seems to me, in the bankruptcy proceedings a breach by reason of the bankrupt's suffering an act which prevented him from performing his contract. I do not rely upon the fact that he presented his own petition as an act which was affirmatively and actively a breach by way of contrast to what would have been the position if a creditor had presented it against him. In presenting his own petition he did but avail himself of an Act of Parliament of which he could lawfully avail himself. But from that act there resulted certain consequences. The only question is what those consequences are. Being under the obligation above stated, a state of things ensued by virtue of which the true owner was dispossessed of his goods and the debtor became incapable of performing the contract of bailment. It seems to me that there thus arose a liability by reason of the obligation under which the debtor lay at the date of the receiving order, and that this gave rise under s. 37, sub-s. 3, to a provable claim. Upon these grounds I think that this appeal succeeds.

Appeal allowed.

Solicitors: *Jackson, Smart, Geake & Co.; Piesse & Son.*

(1) 8 T. R. 308. (2) 14 Q. B. D. 811, at p. 814.

H. B. H.

[IN THE COURT OF APPEAL.]

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NORTH STAFFORDSHIRE COLLIERY OWNERS' ASSOCIATION *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY, LONDON AND NORTH WESTERN RAILWAY COMPANY, GREAT WESTERN RAILWAY COMPANY, AND SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY.

Railway—Regulation—Increase of Rates—Reasonablenesss—Onus of Proof—Railway and Canal Traffic Act, 1894 (57 & 58 *Vict. c.* 54), *s.* 1.

By s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1894, it is enacted that where a railway company have since December 31, 1892, increased, or thereafter increase any rate, then, if any complaint is made that the rate is unreasonable, it shall lie on the company to prove that the increase of the rate is reasonable.

A railway company after January 1, 1893, made a reduction in a rate then in force, and subsequently increased it as from August 1, 1900, but the rate was after the increase no higher than it had been on December 31, 1892:—

Held, by Cozens-Hardy M.R. and Fletcher Moulton L.J. (Kennedy L.J. dissenting), that the railway company had increased the rate since December 31, 1892, within the meaning of the above section.

Decision of the Court of the Railway and Canal Commission reversed.

APPEAL from an order of the Court of the Railway and Canal Commission made on an application under s. 1 of the Railway and Canal Traffic Act, 1894.

The application, which was made by the North Staffordshire Colliery Owners' Association, was as follows:—

"1. The applicants are an association of traders who consign coal from collieries in North Staffordshire over the railways of the defendant companies, and they have obtained a certificate of the Board of Trade, dated July 5, 1906, that they are a proper body to make such complaints as the Railway and Canal Commissioners have jurisdiction to determine.

"2. They have made a complaint to the Board of Trade with respect to the increased rates and charges hereinafter referred to, and their complaint has been duly considered by the Board of Trade under s. 31 of the Railway and Canal Traffic Act, 1888.

"3. The applicants complain that the defendants jointly with

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one another increased as from August 1, 1900, the rates set forth in the schedule hereto in the manner and to the extent shewn in the said schedule.

"4. The applicants complain that the said increased rates are unreasonable.

"And the applicants apply to the Court of the Railway and Canal Commission under the above-mentioned Acts, and in particular under s. 1 of the Railway and Canal Traffic Act, 1894 (1), for an order enjoining the defendants and each of them from increasing, either directly or indirectly, such of the rates

(1) Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1: "(1.) Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional order confirmed by Act of Parliament.

"(2.) Under and subject to any regulations which may be made by the Board of Trade, every railway company shall keep the books, schedules, or other papers, specifying all the rates, charges, and conditions of transport in use upon such railway on the thirty-first day of December, 1892, open for inspection at its head office, and shall upon demand supply copies of or extracts from such books, schedules, and papers."

"(4.) Unless the Court shall before or at the hearing of the complaint otherwise order, a complainant to the Railway and Canal Commissioners under this section shall, before or within fourteen days after filing his complaint, pay to the railway company such sum in respect of any rate or charge complained of as would have been payable by him to them had the rate or charge in force immediately before the increase remained in force; or if that rate or charge is higher than the rate or charge in force on the last day of December, 1892, then such sum as would have been payable on the footing of the last mentioned rate or charge; any dispute as to the amount so payable shall be decided by the registrar, or in such other mode as the Court may order, but such payment or decision shall be without prejudice to any order of the Court upon the complaint.

"(5.) Section twelve of the Railway and Canal Traffic Act, 1888, shall apply in the case of any such complaint, and in the case of any rate or charge increased before the passing of this Act shall have effect as if six months after the passing of this Act were substituted for the limit of one year therein mentioned, but the Board of Trade may, if they think fit, extend the said period of six months with respect to any complaints made to them during that period."

set forth in the schedule to this application as are therein mentioned as being in force on July 31, 1900, and to desist from charging the rates therein mentioned."

The answer of the defendants, the North Staffordshire Railway Company, was as follows:—

"1. These defendants do not admit that they have jointly with the other defendants or any of them or at all increased the rates complained of as alleged in paragraph 3 of the application. Nor do they admit that the rates set forth in the schedule to the application are correctly set forth therein.

"2. If these defendants have increased any of the rates complained of in the application which were in force on July 31, 1900, between the places mentioned in the schedule to the application, such increase of the rates then in force was and is reasonable, and no complaint has been made until this application.

"3. The rates now in force between the places mentioned in the schedule to the application are not greater than those that were in force between the same places on December 31, 1892."

The answers of the other defendants were to the same effect.

It was ordered "that the point of law raised in paragraph 3 of the answer filed herein by the North Staffordshire Railway Company be set down for hearing at the sittings of the Railway Commissioners on January 15, 1907."

1907. Jan. 25. *Sir R. B. Finlay, K.C.* (*Joseph Shaw* with him), for the North Staffordshire Railway Company. The rates are now what they were on December 31, 1892. They have been lowered since that date, and have now been put up again to what they were then. The standard contemplated by the Act of 1894 was the rate on December 31, 1892, and it is only if there is any increase on the rate then in force that the Act comes into operation. That is shewn by sub-s. 2 of s. 1 of the Act, which orders that a record shall be kept of the rates existing on December 31, 1892. Under the provisional orders which came into force on January 1, 1893, there was a great increase of rates, and the object of the Act which was passed in 1894 was to deal with the cases in which rates had been or might be put

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up beyond what they were on December 31, 1892. This is clearly recognized in *Mansion House Association* v. *Great Western Ry. Co.* (1) and *Mansion House Association* v. *London and North Western Ry. Co.* (2) Any other reading of the Act would discourage railway companies from ever lowering their rates.

[He was stopped.]

Cripps, K.C., Moon, K.C., and *Harold Russell*, for the Great Western Railway Company, and *J. A. Simon*, for the London and North Western Railway Company and the Shropshire Union Railways and Canal Company.

Balfour Browne, K.C., and *Rowland Whitehead*, for the applicants. The Railway and Canal Traffic Act, 1894, was passed on August 25, 1894, and it had to deal with two possibilities. In the first place, there had been at the beginning of 1893 a great increase in the rates, and it therefore, in the first part of s. 1, sub-s. 1, dealt with that increase, "Where a railway company have . . . . since the last day of December, 1892 . . . . increased" any rate. Then there was the possibility that after the passing of the Act rates might be increased, so the section went on to enact, "or hereafter increase directly or indirectly any rate." Sub-s. 4 of s. 1 recognizes that distinction. The construction which the railway companies seek to put upon s. 1, sub-s. 1, would make the section read, "Where a railway company have increased, or hereafter increase a rate in force on December 31, 1892," which is not what the section says. Such a construction would prevent the Act from applying to a case where a rate had been increased after December 31, 1892, and that increase had been declared reasonable by this Court, and it then had been again increased. The questions in the cases cited were quite different to that raised in the present case. There the railway companies had raised rates which were stereotyped by this Act—the rates charged on December 31, 1892. Here the sole question is whether the railway companies having lowered these rates since that date can raise them without shewing that the increase is reasonable. Sub-s. 5 of s. 1 also shews that the Legislature intended to deal in the section with

(1) [1895] 2 Q. B. 141; 9 Ry. & Ca. Tr. Cas. 58.

(2) (1896) 9 Ry. & Ca. Tr. Cas. 174.

the two cases,—of an increase over the rates in force on December 31, 1892, and before the passing of the Act, and of any increase after the passing of the Act.

BIGHAM J. I do not think there is any real doubt about this case. It appears that certain rates were in existence on December 31, 1892. On January 1, 1893, those rates were considerably increased. The Legislature then stepped in, because it was thought that those increases were unreasonable. They did not, however, pass this Act of Parliament until August 25, 1904. The object of the Act was, in my opinion, to throw upon the railway company the onus of justifying the increase of those rates. Parliament had to deal with what had been done between December 31, 1892, and the time when the Act came into operation, and they had also to deal with what might be done after the Act came into operation, and therefore they use these words: "Where a railway company have . . . . since the last day of December, 1892 . . . . increased, or hereafter increase" any rate. In both cases the rate referred to is the same rate—that is to say, the rate in existence on December 31, 1892. In either of those events the onus of proving that the increase is reasonable is thrown upon the railway company. That is the simple meaning of this Act. I think the object of the Act was to throw upon the railway company the onus of justifying any increase of the rate over the amount charged on December 31, 1892, and that that was the sole object of the Act. I think, therefore, that there must be judgment for the respondents.

THE HON. A. E. GATHORNE HARDY. I agree. I think that this Act of Parliament was expressly passed to deal with a particular mischief. I think that it has done so in apt words, and that it is impossible to construe the Act of Parliament fairly in any different way from the way it has been construed by the learned judge.

SIR JAMES T. WOODHOUSE. I am not quite so clear as the learned Judge that that was the real intention of the Act, but I think upon the construction of the language of the section I cannot differ from the view that he takes.

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The order of the Court declared that s. 1 of the Railway and Canal Traffic Act, 1894, does not apply to rates that are not greater than those that were in force between the same places on the last day of December, 1892.

A. P. P. K.

The applicants appealed.

March 9. *Balfour Browne, K.C.*, and *Rowland Whitehead*, for the applicants. The question is whether, where a rate which has been lowered since December 31, 1892, is subsequently raised, but still is no higher than it was on December 31, 1892, the railway company can be said to have since December 31, 1892, increased that rate within the meaning of s. 1 of the Railway and Canal Traffic Act, 1894, so as to throw upon the company the onus of proving that the increase is reasonable. The Act of 1894 was the result of the public outcry due to the numerous increases made by the railway companies in their rates as from January 1, 1893, and the object of the Act was two-fold—first, to deal with increases made between January 1, 1893, and August 25, 1894, the date when the Act came into force; and, secondly, to deal with increases in the future, and both the history of this legislation and the language of the Act itself are opposed to the contention of the railway companies that the Act does not apply to an increase which leaves the rate no higher than it was on December 31, 1892. In the present case the increase which was made as from August 1, 1900, comes within the very words of s. 1, sub-s. 1. That sub-section says, "Where a railway company have since the last day of December, 1892. . . . increased or hereafter increase. . . . any rate or charge." Those last words mean any rate or charge which is to be found in the company's books at any time after December 31, 1892. The reference to that date was necessary, not for the purpose of stereotyping the amount of the rates then in force, but in order to make it clear that the Act had a retrospective as well as a future application, and to fix the date, after which all increases had to be justified. If the contention of the railway companies is right, the Act would not apply to an increase in any rate which was not in force on December 31, 1892, thus excluding any new rate made by existing

companies and all the rates of a company, like the Great Central Railway Company, which was not in existence in 1892. Sub-s. 2 is relied on by the railway companies, but it is equally a necessary provision from the applicants' point of view, because railway companies are only bound to keep a record of existing rates, and in order to carry out the retrospective application of the Act it is necessary to have a record of the rates that were being charged at the end of 1892. Sub-s. 4 supports the applicants' contention, because, by expressly dealing with an increase where the rate previously in force was higher than the 1892 rate, it shews that the Legislature contemplated that there might be cases where the rate which was increased still remained lower than the 1892 rate. Sub-s. 5 also shews the distinction between rates which were in existence on December 31, 1892, and rates which have got into the rate-books since that date. Further, although the railway companies seek to construe the Act of 1894 as stereotyping the rates of 1892, it is the fact that by the Acts confirming the provisional orders which came into force on January 1, 1893, some of the 1892 rates were lowered, and this shews plainly that the Legislature did not intend to take the rates in force on December 31, 1892, as the sole standard of reasonableness for the future.

Sir R. B. Finlay, K.C. (*Joseph Shaw* with him), for the North Staffordshire Railway Company; *Cripps, K.C.*, and *Moon, K.C.* (*Harold Russell* with them), for the Great Western Railway Company; *J. A. Simon*, for the London and North Western Railway Company and the Shropshire Union Railways and Canal Company. The Railway and Canal Traffic Act, 1894, was a piece of special legislation directed solely to dealing with the situation which arose from the action of the railway companies in raising many of their rates on January 1, 1893, up to the new maxima which had been created under the legislation of 1888 and 1891, with the result that the position of the traders was not so good on January 1, 1893, as it had been on December 31, 1892. The point involved in this case has often been discussed, though never actually decided, and the various judicial expressions of opinion on the point all support the view that the Act has taken as a prima facie maximum of reasonable rates the point at which they stood on December 31, 1892, and it is only when an

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increase carries the rate above that point that the onus is placed upon the railway company of proving that the increase is reasonable: *Mansion House Association* v. *Great Western Ry. Co.* (1); *Mansion House Association* v. *London and North Western Ry. Co.* (2); *Smith & Forrest* v. *London and North Western Ry. Co.* (3); *Millom and Askam Hematite Iron Co.* v. *Furness Ry. Co.* (4) Previously to the Act of 1894, provided a rate was within the statutory maximum, it was, as a matter of law, a reasonable rate. The Act made this change, that if a rate exceeded the rate in force on December 31, 1892, so far from it being a legal inference that it was reasonable because it was less than the maximum, the onus is thrown on the company to prove the reasonableness of the increase. In that way the Act answered the complaints of the traders. The words of sub-s. 1 of s. 1 support this view. A company cannot be said to have increased a rate since December 31, 1892, if it still remains lower than it was on that date. The words "hereafter increase" in sub-s. 1 refer to the same period as the previous words. The applicants' contention would in fact defeat the object of the Legislature, and would tend to the detriment of the traders, because no company would ever reduce a rate at all if in all cases it had to justify a subsequent increase. The provision in sub-s. 2 points to the intention of the Legislature to maintain the 1892 rates as a standard for the future. If the contention of the railway companies as to the meaning of sub-ss. 1 and 2 is right, sub-s. 4 is absolutely satisfied, for it would apply either to a case where there had been an increase on the 1892 rate which had passed unchallenged, or which, if challenged, had been justified, and which was then followed by a subsequent increase in respect of which a complaint was made, or to a case of a reduction below the 1892 rate, followed by an increase bringing the rate above that limit. For the purpose of deciding this case it is not necessary to consider the position with regard to a railway company authorized after the passing of the Act of 1894; but the application of the Act

(1) [1895] 2 Q. B. 141, at p. 146; 9 Ry. & Ca. Tr. Cas. 58, at pp 65, 70.

(2) 9 Ry. & Ca. Tr. Cas. 174, at pp. 201, 206.

(3) (1900) 11 Ry. & Ca. Tr. Cas. 156, at pp. 159, 161, 163.

(4) (1903) 12 Ry. & Ca. Tr. Cas. 1, at p. 8.

in a case of that sort would have to be considered with reference to the provisions of the special Act authorizing the new undertaking. [*Rickett, Smith & Co.* v. *Midland Ry. Co.* (1) was also cited.]

Balfour Browne, K.C., replied.

Cur. adv. vult.

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March 26. COZENS-HARDY M.R. read the following judgment:—This appeal against a decision of the Railway Commissioners raises a very important point as to the true construction and effect of s. 1 of the Railway and Canal Traffic Act, 1894. The North Staffordshire Railway Company and the other respondent railway companies are in precisely the same position, and for convenience I shall refer only to one railway company. The railway company, pursuant to the provisions of s. 24 of the Railway and Canal Traffic Act, 1888, and a provisional order confirmed by Parliament, had a revised schedule of maximum rates and charges, which schedule came into operation on January 1, 1893. These rates were in most instances higher than the actual rates previously charged, although lower than the old authorized maximum rates. The company thereupon increased the existing rates up to the level of the new schedule. The company subsequently reduced certain of these rates, and in 1900 again increased them as from August, 1900, but not beyond the point at which they stood on December 31, 1892. The North Staffordshire Colliery Owners' Association applied to the Railway Commissioners for an order enjoining the railway company from increasing either directly or indirectly the rates in force in July, 1900, and the Railway Commissioners have held that s. 1 of the Railway and Canal Traffic Act, 1894, does not apply to rates that are not greater than those that were in force between the same places on December 31, 1892; and from this order the applicants appeal.

Under the Act of 1888 there was nothing enabling the Railway Commissioners to prevent a railway company from increasing its rates and charges up to the authorized statutory limit, every charge within that limit being regarded as reasonable. The Act

(1) [1896] 1 Q. B. 260; 9 Ry. & Ca. Tr. Cas. 107.

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of 1888, with the statutory proceedings consequential thereupon, instead of benefiting traders, had a directly opposite effect. The attention of Parliament was called to the situation, and in 1894 provision was made, the precise extent of which has now to be considered, for requiring a railway company under certain circumstances to justify any change by way of increase. Sub-s. 1 is as follows: "Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional order confirmed by Act of Parliament." It is argued on the one hand that the section has no application to the present case, because there has been no increase beyond the standard of 1892, and that it is unimportant that the actual increase of 1900 was made; in other words, that there is no obligation upon the railway company to shew that the increase of 1900 is reasonable. On the other hand, it is argued that the language of the section is perfectly general and wide enough to cover any increase whenever made, and whether the result of the increase is or is not to raise rates above the 1892 standard. In order to arrive at a conclusion as to these rival contentions, it is necessary to examine the scope and the language of the Act of 1894. There are no recitals in the Act, and there is nothing to indicate that the Act was intended to apply only to railway companies which had obtained new schedules coming into operation on January 1, 1893. On the contrary, it is plain that the Act of 1894 is part of the general legislation affecting all railway companies: see ss. 2 to 5. The conduct of the then existing railway companies in raising their rates when the new schedules came into operation no doubt called attention to the necessity for some control over any increase of rates, but I can discover no sufficient ground for holding that the remedy provided was limited to those companies, or that the 1892 standard was one up to which those

companies might at any time raise rates without control. Nor can I think that the jurisdiction of the Railway Commissioners under s. 1 is excluded in the case of new rates to which the 1892 standard could have no relation. In the case of a railway company coming into existence after 1894, it seems reasonably clear that it must justify, not only the first increase of rates, but also any subsequent increase after an intermediate lowering of rates. In other words, s. 1 must, in the case of a new company, apply toties quoties. Parliament assumed that the rates which at any given time were charged by a railway company were reasonable, and only imposed upon the company the necessity, in case of complaint, of justifying the increase. If this is true as to new companies, I can discover no reason why the like toties quoties principle should not be applied to the existing companies. The Act was made retrospective, so as to apply not only to increases after August 25, 1894, but also to increases between December 31, 1892, and that date, and that is sufficient to account for the mention of that date in s. 1. There is nothing in the language of s. 1 to justify us in inserting after the words "rate or charge" the words "beyond the 1892 standard," and this is what in effect the respondents seek to do. Great stress was laid upon sub-s. 2 of s. 1, which requires a railway company to keep open for inspection the schedules in force in 1892. But this was really a necessary provision to enable an applicant to make good the retrospective operation of the Act. Sub-s. 5 supports this view. I do not think it necessary to refer to several cases in which there may be found dicta which, taken apart from their context, may seem to assist the respondents. It is not disputed that the point now before us has never come for decision until the present case. Nor do I think it necessary to refer to the argument that the construction which I am adopting will not benefit the traders, because it will prevent railway companies from temporarily lowering their rates. It may or may not be true that all attempts to interfere with freedom of contract between railway companies and traders end in disaster. Our duty is limited to construction, and we are not concerned with questions of public policy. With the utmost respect for Bigham J., I am unable to adopt his

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view as to the limited operation of the Act of 1894. The result is that in my opinion this appeal must be allowed, and a declaration be made that s. 1 of the Act of 1894 applies to every increase of rates.

FLETCHER MOULTON L.J. read the following judgment:—In this case the appellants, who are a body that has obtained due authorization from the Board of Trade, have made complaints to the Railway Commissioners of certain increases recently made by the respondent railway companies in the rates charged by them, and have claimed that these increases ought to be disallowed. In their defence the respondents have raised a point of law which amounts to a demurrer to the appellants' claim. They say that the rates as they now stand are not in excess of those obtaining in December, 1892, and that, therefore, the Railway Commissioners have no jurisdiction to inquire into them. Judgment has been given by the Railway Commissioners in favour of the respondents on the point, which goes, of course, to the root of the appellants' case. From this decision the present appeal is brought.

It raises a point of cardinal importance in relation to the control of railways over their own rates. It turns upon the true interpretation of the main enacting section of the Railway and Canal Traffic Act, 1894, which is, by virtue of its title and s. 5, an Act to amend the Railway and Canal Traffic Act, 1888, and is to be read with that Act, and on the decision depends to a large extent the scope of the jurisdiction given to the Railway Commissioners by those conjoined Acts. In construing an Act a Court is entitled to acquaint itself with the circumstances under which it was passed, and in the present case this is a matter of great importance. Fortunately there is no contest as to the circumstances which led up to the Act of 1894. Prior and up to the year 1891 the railway companies had had full control of the rates charged by them (apart from questions of undue preference and the like, with which we have nothing to do in the present case), so long as they did not permit these rates to exceed the parliamentary maxima inserted in their Acts. These maxima were in many cases to be found in Acts passed in the early years of railway

enterprise, when the conditions of traffic in the country were widely different to those which now obtain, and at best they were only very rough approximations to the rates which would reasonably be charged in practice. The Courts, however, had no power to interfere with the rates actually charged so long as they were below these maxima, and hence it was customary to say that it was a presumption of law that a rate was reasonable so long as it did not exceed the parliamentary maximum. A powerful public opinion arose among the traders of the country to the effect that the latitude thus given to railway companies was too great, and was in many cases abused, and accordingly, soon after the passing of the Railway and Canal Traffic Act, 1888, an exhaustive public inquiry into the question of railway rates was held, under the presidency of Lord Balfour of Burleigh. The outcome of this inquiry was a general revision of maximum rates, and each railway company was required to promote a provisional order, setting out in full detail the new maximum rates applicable to the traffic over its lines. These provisional orders were duly confirmed by Act of Parliament, and thus became binding on the railway companies from January 1, 1893, the date on which they all came into force. The schedules of rates which they contained were far more detailed and elaborate than those contained in the original Acts, and went far to meet the demands that had been made by the traders.

But the legal status of the rates in the new schedules was identical with that of the older maximum rates. No further control had been given to the Courts or to the Railway Commissioners over the rates actually charged. The position had been changed only by the substitution of one set of maximum rates for another. Accordingly, when the new rates came into force on January 1, 1893, the railway companies (who no doubt smarted considerably under the curtailment of their privileges by the statutory changes in their maximum rates) raised the bulk of their actual rates to the maxima thus permitted them. This occasioned a great outcry amongst the traders. They protested that the rates fixed by the new legislation were to be regarded as maximum rates to be resorted to by the railway companies only under exceptional circumstances, and were not to be treated as

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normal rates to be used under ordinary circumstances. This outcry led to a parliamentary struggle which resulted in the passing of the Railway and Canal Traffic Act, 1894. The main enacting section, which is the section which we have to construe, reads as follows: "Where a railway company have, either alone or jointly with any other railway companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional order confirmed by Act of Parliament." All parties are agreed that this is the first attempt made by the Legislature to control the charges actually made by railway companies where those charges do not exceed the maximum rates allowed by statute. But the appellants and respondents differ widely in their views as to the nature and extent of this interference. The respondents contend that this enactment is to be looked upon as a special enactment to meet the special evil created by the general raising of rates on the part of railway companies from January 1, 1893, and that its sole operation is to throw upon railway companies the onus of justifying an increase of the rates actually charged by them at any time above those charged immediately before that date when the old maxima were still in force; and because, as a matter of history, the general raising of the rates to the new maxima in January, 1893, was the original moving cause of the new legislation, they ask us to presume that it only sought to undo the special mischief which had thus been done, and that we must so construe it as to limit its operation accordingly. The appellants put forward a widely different contention. They admit that the action of the railway companies in thus raising their actual charges en bloc to the level of the new maxima historically led to the legislation in question, but they contend that it did so, not merely as being a specific evil needing and receiving a specific remedy, but as drawing the attention of the Legislature in the most striking manner to the possible abuse of the power

of railway companies to fix charges so long as the exercise of that power was controlled only by the existence of permissible maxima; and they contend that the Legislature intended not merely to provide a remedy for the mischief actually wrought in January, 1893, but also to introduce a check upon future increases of actual rates by throwing upon the railway companies the onus of shewing that such increases are reasonable. They claim that the Legislature introduced this new policy in railway legislation by the Act of 1894, which it made a general railway Act, and that it met the special evil which had no doubt been the immediate cause of its action by making this policy so far retrospective as to apply to the steps taken by the railway companies in respect of their rates at the commencement of 1893. In other words, it made the newly devised check upon the power of the railway companies become operative as from the end of December, 1892.

These are the two rival interpretations put before us by the parties in this case. The history of the legislation is consistent with either, but fortunately we are not driven to hazardous speculation as to which is the more probable outcome of the events that led up to it. We have to decide the true meaning of the legislation from the language of the enactment itself.

The case was argued very ably and with great moderation on both sides. Each party sought support for their contention in the later sub-sections of s. 1 of the Act, but these sub-sections can, after all, only help us to a subsidiary extent according as they seem to fall in more naturally with the one or the other reading of the Act. Our first duty is to construe the language of the enactment itself which is contained in sub-s. 1, and it is only in case of an ambiguity in that language that we ought to allow ourselves to be influenced by the indirect evidence of the later sub-sections which relate only to the machinery for carrying out the main enactment. After giving the matter my most careful consideration I have come to the conclusion that we must give to the enactment the broader meaning contended for by the appellants. In other words, I am of opinion that the Act throws upon a railway company when it raises a rate the onus of proving that

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it has acted reasonably in so doing should the question be challenged by a complaint properly made.

The enacting section of the Act deals with two types of cases, viz., increases in the past and increases in the future. I will consider first the language relating to future increases as being the safer guide to the intention of the Legislature so far as general policy is concerned. The words material for our present purpose read thus: "Where a railway company . . . hereafter increase directly or indirectly any rate or charge . . . it shall lie on the company to prove that the increase of the rate or charge is reasonable." These words are simple and to my mind clear. They purport to relate to every increase and to every rate or charge, and I can find no words which limit this wide application. But, to make them bear the meaning contended for by the respondents, we should have to introduce two limitations. In the first place, we must read into the clause as qualifying the word "increase" some such words as "beyond the corresponding rate or charge in force on the last day of December, 1892"; and, secondly, we must read into the clause as qualifying the words "rate or charge" some such words as "existing on the last day of December, 1892." This second limitation appears to me directly to conflict with the actual language of the clause, which speaks of "any rate or charge." No doubt such a limitation might have to be implied from the necessity of the case, were the previous limitation expressly present in the clause, but when it is not to be found there I can imagine no possible justification for thus introducing a limitation to the words "any rate or charge" which is directly inconsistent with the express generality of the words actually used. This is to my mind a most serious argument in favour of the broader view. Sub-s. 1 is, as I have pointed out, specifically made to apply to increasing "any rate or charge." This can only mean any actual rate or charge. It has nothing whatever to do with permissible maximum charges. Now, it must be known to all who are conversant with railways that new rates and charges are necessarily made from time to time. This is the case even on old-established railways as new traffic or conditions of traffic arise. But this is more strikingly the case when a new railway, such as the Great

Central Railway, is constructed. Such a railway must be equipped with a whole body of rates which are necessarily new, and in turn it must cause the older-established railways to make new rates to the new stations upon it. If we adopt the contention of the respondents the whole of these rates and charges would be outside the scope of the enactment because no corresponding rates existed in December, 1892. That the Legislature, which must be assumed to be cognizant of such matters, could under these circumstances have made its enactment apply in terms to all rates and charges without exception when it intended to exclude all new rates and charges from its operation, seems to me inconceivable. To put the matter shortly, the respondents ask us to read into this part of the clause after the words "any rate or charge" the following words: "existing on the last day of December, 1892, beyond the amounts at which such rate or charge stood on such last-mentioned day." I can see no possible justification for so doing, and I am convinced that, if this had been the intention of the Legislature, it would have expressed it plainly and not have left it entirely a matter of inference from the supposed intention of the clause.

And, further, is there anything in the remainder of the clause, i.e., in the enacting words that relate to the past, which in any way countenances our taking these liberties with that portion of the sub-section which relates to the future? I can see none. The language that relates to increases made between December 31, 1892, and the passing of the Act is nothing more than that which is strictly necessary to subject changes made during that period to the operation of the new legislation. I can find no word or phrase which indicates any intention to put the rates charged in December, 1892, in any other or different position to the rates charged at any other and subsequent moment of time, excepting that you cannot go behind that date in order to prove such an increase as will enable you to challenge a rate or charge under the new legislation. But in legislation like this, which is to be made to a certain extent retrospective, some point of time must be fixed as the initial date unless you are to give to traders the power to challenge everything that has been done since railways were first started. The words in this sub-section that relate to the past are just such as would naturally be used in order to fix such an

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initial date, and I can find no single word or phrase which points to anything further than this. So far from the sub-section according any special sanction to the scheme of rates and charges existing in December, 1892, it makes no reference to it. These rates and charges derive their practical importance in connection with the legislation by reason of their being the rates and charges initially existing, and as thus furnishing material for proving that existing rates are increases upon them when such is the case. But this follows from the nature of the enactment whichever interpretation be given to it. There are no words which mention these rates and charges so as to give them any other or additional authority, or from which any such authority can be implied. The more I consider the language of sub-s. 1, the more I feel that it cannot be fairly interpreted in the limited sense which the respondents seek to give to it, and that unless we came to the task of construing it with a firm belief (which the railway companies doubtless entertain) that it was intended to have only that limited effect no one would think of so construing it.

There is a subsidiary criticism which, in my opinion, is not without its weight. The respondents, in order to make the language of sub-s. 1 conform to their contention, ask us to treat the word "increase" as meaning increase beyond the corresponding rate in December, 1892. But, if that be so, the justification for the increase must be obtained in all cases and at all times by a comparison between the circumstances of traffic at the date of the increase and those which obtained in 1892. It appears to me very unlikely that the Legislature would have taken as a general policy for the future a test of reasonableness of increase which would require the contending parties to contrast the circumstances that existed at a fixed date many years before with the circumstances of the moment, circumstances which would in a few years become widely different to those that existed in December, 1892, and would become increasingly so as years rolled by. It is far more consonant with the language of the Act, and with its admittedly remedial aim, to suppose that what it intended to require from the railway companies was a justification of each specific increase made by them, a justification which would probably be demanded at or about the time

when it was first made, a process which would only involve the consideration of changes of circumstances occurring within a comparatively short space of time.

I will now turn to the later sub-sections as bearing on the main question before us. The respondents seek to derive from sub-s. 2 an indication that the Legislature intended to give a special authority to the rates in force in December, 1892, by reason of its providing therein that every railway company should keep full records of such rates. But this was necessary in any case to render effective the retrospective portion of the Act, and, therefore, whichever interpretation we take, the presence of sub-s. 2 is adequately accounted for. I may add that I fully agree with the language of Kay L.J. in the case of *Mansion House Association* v. *London and North Western Ry. Co.* (1) In speaking of this sub-section he says: "There is nothing there to say that the charges on December 31, 1892, are to be treated as fair or unfair; there is not a word about it."

There remains sub-s. 4. The earlier portion of that section is neutral, and sheds no light upon the conflicting interpretations. But the latter portion of sub-s. 4 merits somewhat more particular notice. The existence of its provisions and the language in which they are expressed shew unmistakably that the Act contemplates the making of a complaint in cases where the rate previously existing (upon which the increase complained of is made) is neither higher than, nor equal to, that which existed in December, 1892, so that it must either have been lower than such rate or be a new rate not then existing. In such case the sum which is to be paid into Court by the complainant is based upon this lower rate. This appears to me to indicate that the Legislature looked upon this lower rate as that which would be payable if the railway company failed to justify the increase, so that it evidently intended to deal with, and if necessary disallow, increases on all rates whether such rates were or were not higher than those that prevailed in December, 1892. These provisions seem to me to be inconsistent with the theory that the Legislature recognized in railway companies an absolute right to raise their rates up to the level prevailing in December, 1892. To my

(1) 9 Ry. & Ca. Tr. Cas. 174, at p. 201.

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mind this sub-section indicates that the Legislature looked upon the rates prevailing in December, 1892, as practical maxima that ought rarely to be exceeded, rather than as standard rates, for while in the case of lower rates it permits the payment into Court (which is a condition precedent to the right to make a complaint) to be made upon the basis of the actual unincreased rate, it never requires such payment to be made on the basis of a rate higher than that prevailing in December, 1892, even though the actual unincreased rate was at a higher figure.

It was very powerfully pressed upon us by counsel on behalf of the railway companies that on the above interpretation the enactment might tend to check a lowering of rates by a railway company, since it would know that it would have to justify any future rise even though it amounted to no more than a return to the old rates. I do not attribute so much weight to this objection as do the counsel for the respondents, because, in my opinion, the sub-section does not limit in any way the mode of justifying the increase, and it might well be open to the railway company to shew that the increase of the charge was reasonable by shewing that the previous reduction had been found to be too great, or that it was made under circumstances which no longer existed. But after making all due allowance for this, there is no doubt that this criticism shews that the remedy proposed by the Legislature is an imperfect one, and is not of itself sufficient to secure that the rates charged shall in all cases be reasonable. But, when I think of the almost insuperable difficulty of effectively regulating railway rates by legislation, I am not surprised that the Legislature did not discover a complete solution of the problem. Speaking for myself, however, I believe that the general effect of this enactment, interpreted as I have explained, would be to keep rates nearer to that which is reasonable. It would prevent railways from raising rates merely by reason of the necessities of the traders at moments when trade is brisk and traders eager for transport, or, to use a phrase which is not unknown among railway men, "putting upon traffic as much as it will bear." But, above all, it would prevent rates being raised unreasonably by combinations between competing railways, which is one of

the gravest dangers of private railway management, and this alone would be sufficient to make such legislation a valuable protection to traders. The Legislature appear to me to have realized in this case the stupendous difficulty of giving to any tribunal the power and duty of examining into the reasonableness of the innumerable rates and charges existing at any moment, and to have contented themselves with the theoretically less perfect measure of control attained by throwing upon railways the burden of justifying any change that they make in the direction of increase, thus accepting a remedy which was practical though imperfect, instead of either attempting the impracticable task of regulating rates by direct legislation or leaving the evil without any remedy at all.

I ought to add that I do not think that the references to the point before us in decided cases assist the Court in the present case, or in any way affect our duty to decide it in strict accordance with our view of the proper interpretation of the statute. Previous cases have dealt mainly, if not entirely, with the retrospective portion of the enactment, in applying which it makes little practical difference which of the two interpretations be accepted. This is, in my opinion, the first case that has imposed upon the Court the obligation to decide between the rival interpretations which are now before us. In spite, therefore, of the great respect that I have for the opinion of Bigham J., I am of opinion that this appeal must be allowed.

KENNEDY L.J. read the following judgment:—In this case the appellants, the North Staffordshire Colliery Owners' Association, ask the Court to reverse a judgment of the Court of the Railway and Canal Commission dismissing the appellants' application against the North Staffordshire Railway Company and three other railway companies for an order enjoining the defendants and each of them from increasing, either directly or indirectly, certain rates in force on July 31, 1900, and to desist from charging the increased rates mentioned in the schedule to the application. Each of the defendants, in answer to the application, pleaded (inter alia) that the rates complained of were not

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greater than those which were in force on December 31, 1892. This allegation of fact is admittedly true. The increase complained of is the increase of a rate which had since December 31, 1892, been lowered, and the increase had still left the rate below the 1892 level. The judgment of Bigham J. has decided that the truth of this allegation constitutes, in point of law, a sufficient answer to the appellants' application. We are asked by the appellants to say that the decision is wrong. In my opinion it is right and ought to be affirmed.

The matter in dispute is the effect of the Railway and Canal Traffic Act, 1894. The meaning of the legislation must of course be sought for, in the first instance by an examination of the Act itself. We are not entitled to swerve from the fair and natural interpretation of statutory provisions, if they are free from apparent ambiguity, because we think that that interpretation produces results which the authors of the legislation could not have foreseen, or ought not, in our opinion, to have intended, or because another interpretation might apparently improve the working of the statute. At the same time it is our duty to approach the question of interpretation with an accurate appreciation of the circumstances or relations with which the statute purports to interfere, and of the effects, according to the one construction or the other, of such interference; and when, as in the present case, the statute dealt with the regulation of a special branch of commercial business, and forms part of a series of statutes dealing with the same subject-matter, it is also, I conceive, our duty in construing provisions which upon their face are susceptible of more than one construction, not to refuse, in making our choice, enlightenment which may be gained either from other parts of the same statute which have a plain meaning, or from the language of the connected statutes, or from the consideration of the results which must flow from the adoption of the one or the other of the rival interpretations. Of course this reference to considerations outside the literal interpretation of the Act which have to be construed must be carefully made. The relevant facts in the present case, as I take them from the statements of counsel in the Court below and before us, are few, simple, and undisputed. As the law stood in regard to railway

traffic at the commencement of the year 1893, the railway companies, whose schedules of rates and charges had recently been revised, and as revised had received parliamentary sanction, were still at liberty to raise their rates and charges, provided that in the case of any rate or charge they did not raise it beyond the maximum fixed by the revised schedule. The revised schedules came into force on January 1, 1893, and the railway companies to a considerable extent availed themselves of the liberty, and raised rates and charges above the level at which they stood at the end of 1892. The trading community complained loudly of this increase, and the Railway and Canal Traffic Act, 1894, was the outcome of the keen controversy between the railway companies and the traders as to the fairness and propriety of this increase.

There is no doubt that s. 1, sub-ss. 1 and 3, of this Act, which is to be read with the Railway and Canal Traffic Acts, 1873 to 1888, give jurisdiction to the Railway and Canal Commissioners to hear and determine complaints, in some circumstances, in respect of an increase of rate or charge, and enact that where such complaint has to be adjudicated upon it shall lie on the railway company to prove that the increase of the rate or charge is reasonable. The matter in dispute is, what are those circumstances?

The most important section is s. 1, sub-s. 1, which runs thus :—"Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then, if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional order confirmed by Act of Parliament." The contention of the respondents, which has been accepted by the judgment of the Railway and Canal Commissioners, is that the effect of this section (read with s. 1, sub-s. 3, which confers jurisdiction upon the Commissioners) is to give a right of

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complaint in any case in which a railway company is found at any time after December 31, 1892, either before or after the coming into operation of the Act of 1894, to have increased a rate or charge above the level at which the corresponding rate or charge stood on December 31, 1892, and, further, to enact that on the hearing of such a complaint the burden of proving the reasonableness of such an increase lies in every case upon the railway company. If this contention is correct, the case of the appellants fails, because the increase of which they complain is an increase of a rate which since December 31, 1892, had first been lowered by the company, and which after the increase complained of still remained below the level of December 31, 1892. The contention of the appellants is that the section has a far wider effect; that it has no reference to the level of rates on December 31, 1892, as a standard; that if any railway company had between December 31, 1892, and the date of the Act, made, or if any railway company should in the future make, any increase in any rate or charge, whether such a rate or charge existed in 1892 or not, and however insignificant the increase be, and although it results in a rate or charge below the level of December 31, 1892, this section gives a right of complaint, and throws upon the railway company the burden of proving the reasonableness of such increase. If this be the true construction of the section, the answer of each of the respondents so far as it depends upon the third paragraph of their pleading fails. In my view, the respondents' interpretation of the section, if viewed by itself, is the preferable interpretation; and if, treating the meaning of that section read by itself as uncertain, we look either to the other provisions of the Act, or what I may call the inherent probabilities of the intention of the Legislature, the respondents' interpretation appears to me to gain strong confirmation. But for the difference of opinion on the part of the Master of the Rolls and Fletcher Moulton L.J., which makes me, of course, very diffident of the correctness of my own opinion, I should after careful consideration of the Act, have been almost inclined to adopt the language of the judgment of Bigham J. and say that I do not think there is any real doubt about the case. Take, in the first place, the language of s. 1, sub-s. 1, by itself. As I read it there is no strangeness,

such as the appellants suggest, in the omission after the words "increased" and "increase" in line 4 of the words "above the level of the corresponding rate on December 31, 1892," or of words to the like effect. The collocation of the words "since the last day of December, 1892," in the framework of the section makes the reference of "increased" and "increase" to the standard of rate on the named date so plain as to render any explanatory addition a mere superfluity. Let me offer a simple and homely illustration. If I said of A. B.: "If since he married last year he has increased his expenditure, or if he ever increases it in the future, he will deserve censure," would any reasonably intelligent listener understand me to refer to an intermediate lowering of expenditure below that existing at the time of A. B.'s marriage and a subsequent rise which still did not bring the expenditure above the level at that date? Would he not understand me as censuring only such an increase of expenditure as raised it above the level of the named date? The appellants say that the words "a railway company" in the first line of the section and "any rate or charge" in the fifth line are large enough to include a railway not existing in 1892, and a rate or charge created since 1892 and to which there was no corresponding rate or charge existing in 1892. I agree that, if isolated from the context, the expressions referred to admit these larger meanings. But, with all respect to those who think differently, I would ask, would any one, seeking only to give to the words their actual import, read "when a railway company have . . . . since December 31, 1892 . . . . increased or hereafter increase" as referring to any railways except such as existed at the named date? In regard to the later expression "any rate or charge," it appears to me that it ought not to be read in isolation, but in close connection, with the preceding context. If I am in error as to the meaning of that context, it will be legitimate to treat these words as having the wider application for which the appellants argue; but if I am right in my interpretation of the earlier context, there is certainly nothing forced or unnatural in construing these words in a sense which is harmonious with that interpretation.

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If it is legitimate in choosing the one and the other construction of the section to regard the practical results which were much discussed in the arguments before us, the construction for which the respondents contend appears to me to gain strength from such considerations. If the appellants are right, whereas a railway company which has simply maintained the 1892 level is immune from all hazard of trouble and expense of litigation at the instance of complainants, because it has not increased its rates above that, another railway company which has lowered any rate and then raised it, as the respondents have done in the present case, although the rate, as so increased, does not reach the level of 1892 (as is also the case here), finds cast upon it the risk under this Act of complaint before the railway commissioners, and the burden, in the consequent litigation, of proving the reasonableness of such increase. I cannot but ask myself, is this equitable as between the two companies? And further, would it be to the interest of the traders themselves that a railway company should, in the future, be discouraged from making any experimental reduction of 1892 rates by the imposition of a liability in the event of a subsequent increase in the rate, however small that may be, to which they will never be exposed if they do not make such an experiment for the traders' advantage. The appellants object to the merits, or perhaps I ought rather to say, to the probable soundness of the respondents' interpretation of the section, on the ground that it would exclude from the operation of the Act railways created since 1892, and, in the case of existing railways, the increase of new rates, i.e., rates coming into existence since 1892, such as might come into existence where a new railway station is established. It appears to me that the respondents find a sufficient answer to this argument in the simple question, Why should the operation of that Act be extended to new railways or new rates? Why should such an intention on the part of the Legislature be expected or presumed? The Act originated admittedly in a complaint of increases made in 1893 of rates which existed in 1892, in a complaint which, as Bigham J. points out tersely in his judgment, concerned then existing railways and then existing rates. This being so, might it not more reasonably be expected, if this Act was, as the

appellants say, intended to deal with far more than the subject-matter of the controversy and to have the far wider and most important application to new railways and new kinds of rates and increases of a rate or a charge, new or old, although the increase did not bring the rate or charge above the level of 1892, that the Legislature would indicate, by the insertion of some apt and precise words in this sub-section, the intention to make a change so novel, so large, and, so far as the controversy went, so uncalled for, instead of leaving the inference to be drawn doubtfully from the sub-section as it now appears? One more remark, and one only, I will make as to the appellants' point as to new railways. If a new railway comes into existence, Parliament can, and I presume would, take care that the legislation which creates and regulates it contains proper provisions as to its schedule of rates and charges, and for such limitations upon its power to increase those rates and charges as Parliament may deem just. And I may note in passing that I doubt greatly whether the Great Central Railway, which was referred to in argument as an illustration of a new railway, can properly be treated as such. The Great Central Railway Act was passed in 1897, but the Manchester, Sheffield and Lincolnshire Railway (Extension to London) Act, which formed the earlier stage in its gradual creation, was passed in 1893, and therefore before the passing of this Act; and in s. 117 of that Act, as well as in s. 84 of the Act of 1897, are provisions which seem to keep in force previously existing legislation applicable to the traffic of the railways out of which, with certain extension, the Great Central Railway was constructed.

I now come to s. 1, sub-s. 2, which is closely connected with the sub-section which we have so far been considering. It runs as follows: "Under and subject to any regulations which may be made by the Board of Trade, every railway company shall keep the books, schedules, or other papers specifying all the rates, charges, and conditions of transport in use upon such railway on December 31, 1892, open for inspection at its head office, and shall upon demand supply copies of or extracts from such books, schedules, and papers." Now it is apparent that if the respondents' reading of the 1st sub-section is the right one, this

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sub-section provides precisely and perfectly for the preservation and accessibility of all the documents which can serve promptly and easily to inform an inquirer whether an increase has been made of which the 1st sub-section gives him a right to complain to the Railway and Canal Commissioners, and what that increase is. The standard being the level of December 31, 1892, nothing more is wanted. If, on the other hand, the appellants' interpretation of the 1st sub-section be the true interpretation, the authors of this 2nd sub-section, in providing for the cases which form, according to that interpretation, only a mere fragment of the bulk of cases which are intended to be covered by the Act in s. 1, sub-s. 1, have been guilty in the enactment of this sub-section, which immediately follows, of an extraordinary legislative omission. If it was deemed right to legislate for the preservation and accessibility of documents which are relevant to the case of an increase of rate above the level of December 31, 1892, why should not similar assistance be given to the public in regard to any of the other cases in which there is an increase of rate, if these cases do really come within the principal enactment. The usefulness of the preservation and accessibility would be the same in regard to the latter as to the former class of increases. If, as is the appellants' view with regard to the intention of the Act, all increases, whatever their date of origin or their extent, are within its purview, the natural and simple course, as I venture to think, would have been in sub-s. 2, instead of the existing provision, which is applicable only to cases of increase above the level of December 31, 1892, to have provided that every railway company should keep the books, schedules and other papers specifying all the rates, charges, and conditions of transport in use upon such railway on December 31, 1892, and in every succeeding year open for inspection, &c. It appears to me that, although the 2nd sub-section is not strictly and absolutely inconsistent with the appellants' interpretation of the 1st sub-section (inasmuch as it is, I agree, possible to say that, although no reason for it can be found, the Legislature has chosen to make its provisions applicable only to a certain fraction of the cases which, according to the appellants' interpretation, are covered by the 1st sub-section), still the

provisions of the 2nd sub-section are so perfectly consistent and so exactly fitted to accord with the respondents' interpretation of the 1st sub-section, that it affords a valuable support for that interpretation, and that to this fact, as it is our duty to have regard to all parts of the Act, we must not fail to give careful consideration.

Some further support, in my humble judgment, appears if we carefully consider sub-s. 4. The first and only material part of the sub-section is this: "Unless the Court shall before or at the hearing of the complaint otherwise order, a complainant to the Railway and Canal Commissioners under this section shall, before or within fourteen days after filing his complaint, pay to the railway company such sum in respect of any rate or charge complained of as would have been payable by him to them had the rate or charge in force immediately before the increase remained in force; or if that rate or charge is higher than the rate or charge in force on the last day of December, 1892, then such sum as would have been payable on the footing of the last mentioned rate or charge." The meaning of this enactment is, it appears to me, reasonably plain. Before, or within fourteen days after, filing his complaint the complainant is to make a payment to the railway company. If the rate or charge in force before the increase of which he complains is either (*a*) below or (*b*) on the level of the rate or charge in force on December 31, 1892, the payment is to be calculated on the basis of that rate or charge. But the Legislature also thought it just to provide for the case of a complaint with respect to the increase of a rate or charge where the railway company had, previously to the increase which occasioned the complaint, made an increase above the level of December 31, 1892, which had passed unchallenged. In order to meet this case, in which the rate or charge in force immediately before the increase complained of would be higher than the rate or charge on December 31, 1892, the Legislature provided (*c*) that in such circumstances the payment to be made by the complainant should be calculated, not upon the basis of the unchallenged excess rate, but upon the lower basis of the rate of December 31, 1892. Fairly considered, this sub-section appears

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to me to support rather the respondents' contention that this Act of Parliament treats the level of rate or charge in force as on December 31, 1892, as the standard level, and creates a right of complaint, with the burden of proof of reasonableness of rate or charge resting upon the railway company against whom the complaint is put forward, only in the case of a rate or charge being increased above that standard level. The subject of complaint on the part of the appellants in the present case, is as I stated at the outset of this judgment, an increase in a rate which at the time of the complaint stood at a lower level than in 1892, and even after the increase complained of did not reach that level.

Passing from the 4th to the 5th sub-section, the only other part of this Act referred to in the arguments of counsel, I need only say that it does not appear to me to shed any light upon the present controversy. It applies s. 12 of the Railway and Canal Traffic Act, 1888, to complaints under this Act, and in substance enacts that in regard to cases of increase which have occurred between the end of 1892 and the passing of this Act a six months' limit shall (subject to a power of extension in the Board of Trade) be substituted for the twelve months' limit prescribed by the earlier Act. As the operation of the Act of 1894 is retrospective, it was, I presume, thought to be only fair and reasonable that, if a complaint is to be made as to the past, it should be made within the shorter period. Whichever of the two rival interpretations of the scope of the Act is adopted, such a provision is equally intelligible.

I will only add to what I have already said in this judgment upon the interpretation of the Act a reference to two judicial pronouncements which seem to me to be in point. The first of these is one found in the judgment of Collins J. in the case of *Mansion House Association* v. *Great Western Ry. Co.* (1) "Now, is the complaint in question here one that the Commissioners have jurisdiction to determine? It seems to me that that follows inevitably from reading the words of the 1st sub-section of s. 1 of the Act of 1894, which gives a right of complaint

(1) 9 Ry. & Can. Tr. Cas. 58, at p. 65.

where rates that were in existence on the last day of December, 1892, have been directly or indirectly increased. That is the condition precedent; and then, 'if any complaint is made that such rate or charge is unreasonable it shall lie on the company to prove that the increase is reasonable.'" In the same case, in the Court of Appeal Rigby L.J., after expressing his concurrence in what the Master of the Rolls had said in his judgment as to the Act of 1888, and in his general observations, proceeded (1): "I should like, however, to say one word with reference to the construction of the Act of 1894. That Act appears to have taken as a prima facie maximum of rates and charges to be made by railway companies the point at which they were fixed on a particular day, December 31, 1892. It does not prohibit absolutely all increase, but it throws upon the railway company the duty of shewing that any increase was a reasonable increase."

These are, no doubt, pronouncements of judicial opinions which were not given for the purpose of deciding the point which we have to decide, but in the course of deciding a different matter of dispute in regard to the persons who might make complaints under the Act of 1894 and the right of the railway company to justify generally the raising of a rate for a whole class. Indeed, one may note in passing the fact which, if the present appellants are right, as we know the watchfulness which the trading community properly maintains in regard to railway rates, is a very curious fact, viz., that, although nearly thirteen years have elapsed since the passing of the Act of 1894, the contention which the appellants ask us to adopt is now put forward for the first time. Although these expressions of opinion on the part of Lord Collins (then Collins J.) and Rigby L.J. were not necessary for the decisions at which they arrived in the case before them, they cannot on that account be treated otherwise than as affording weighty support to the respondents' contention, coming as they do from judges of great eminence, and, in the case of Lord Collins, from a judge who, as a member of the Court of Railway and Canal Commission, was peculiarly versed in all matters of legislation affecting railway traffic.

(1) 9 Ry. & Can. Tr. Cas. 58, at p. 70; [1895] 2 Q. B., at p. 146.

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For the reasons which I have set forth at greater length and in more detail than I should otherwise have wished, not only on account of the importance of the question, but also because I have the misfortune to differ from the other members of the Court, I am of opinion that this appeal ought to be dismissed.

Appeal allowed.

Solicitor for applicants: *M. A. Orgill, for J. H. Knight, Newcastle-under-Lyme.*

Solicitors for North Staffordshire Railway Company: *Burchells.*

Solicitor for Great Western Railway Company: *R. R. Nelson.*

Solicitor for London and North Western Railway Company and Shropshire Union Railways and Canal Company: *C. de J. Andrewes.*

F. O. R.

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[IN THE COURT OF APPEAL.]

WILKINSON AND ANOTHER *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway—Contract of Carriage—Conveyance of Merchandise by Passenger Train—Absence of Obligation to carry—Special Contract not in Writing—Liability for Loss—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict.* c. 31), *s.* 7.

Section 7 of the Railway and Canal Traffic Act, 1854, is applicable to a case where a railway company, though under no obligation to carry certain goods, has, nevertheless, made a contract for their carriage.

The defendant company by its timetables offered to allow commercial travellers to take with them by passenger train, free of charge, a certain amount of luggage, which was not ordinary passenger's luggage, "on the condition that the company is relieved from all liability for loss, damage, misdelivery, or delay." The plaintiffs, who were commercial travellers, in pursuance of this offer, but without signing any special contract to that effect, took with them on a journey by the defendant company's line a case of samples, which was lost on the journey by the negligence of the company's servants.

Held (affirming the judgment of Kennedy and Bray JJ.), that, as no special contract had been signed by the plaintiffs, the provisions of s. 7

of the Railway and Canal Traffic Act, 1854, applied, and, the condition being thereby made null and void, the defendant company were liable for the loss of the samples.

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APPEAL from the judgment of a divisional Court (Kennedy and Bray JJ.) upon an appeal from the Manchester County Court. (1)

The plaintiffs, who were father and son, were commercial travellers in the cigar trade, as was known by the defendants, and were travelling in the ordinary course of their business. They took third class and saloon ordinary return tickets from Huddersfield to Belfast by the defendants' railway and steamer. By a notice in the timetables issued by the defendants it was stated that third-class passengers were allowed 100 lb. per passenger of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge, and that "commercial travellers . . . are allowed to take with them, free of charge, the undermentioned quantities of luggage, namely, first-class 3 cwt., second-class 2 cwt., third-class 1½ cwt., per passenger, on the condition that the company is relieved from all liability for loss, damage, misdelivery, or delay." It was further stated by the notice that commercial travellers were not allowed to take with them "as portions of their luggage or samples" any of certain specified articles, which did not include samples of cigars.

On arriving at Fleetwood the defendants took charge (inter alia) of a skip which was being used by the plaintiffs jointly for the conveyance of samples, and which was under 1½ cwt. in weight. The skip was admitted not to be ordinary passenger's luggage. The plaintiffs went on to the boat, leaving the skip with the defendants' servants to be brought from the railway to the boat. On arriving at Belfast they were informed that the skip had been dropped into the sea by the defendants' servants, and that it could not therefore be delivered to them. The action was brought to recover the value of the skip and its contents.

The County Court judge gave judgment for the plaintiffs, on the ground that the condition in the defendants' timetables was not binding on the plaintiffs, as no special contract had been

(1) [1906] 2 K. B. 619

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signed by them in accordance with s. 7 of the Railway and Canal Traffic Act, 1854.

The divisional Court on appeal affirmed his decision. (1)

C. A. Russell, K.C., E. Acton with him, for the defendants. There was really no contract for the carriage of these samples by the defendants. There was merely a licence to the plaintiffs to have them carried along with themselves as passengers. The defendants are not bound to carry merchandise as passenger's luggage. If the railway company permit a passenger to take such luggage with him in a passenger train, he can only avail himself of that permission subject to the terms upon which it was granted. Sect. 7 of the Railway and Canal Traffic Act, 1854, only applies to cases in which the railway company, being bound as common carriers or by statute to carry goods, enter into a contract for such carriage. The intention was to provide that, where the company are under an obligation to carry, they shall not limit their liability as carriers except by a contract which is reasonable, and which is signed by the person delivering the goods for carriage. Where the company are not bound to carry, but only do so voluntarily, the section does not apply, and the company may make what terms they please as to such carriage: *Stone & Co.* v. *Midland Ry. Co.* (2) The defendants having voluntarily carried goods which they were not bound to carry, the plaintiffs cannot approbate and reprobate the contract at the same time. [He also cited *Cahill* v. *London and North Western Ry. Co.* (3)]

Montague Shearman, K.C., Holman Gregory with him, for the plaintiffs. The terms of s. 7 appear to be applicable to all goods received for carriage by the railway company, whether under contract or not. There clearly was, however, a contract of carriage in this case. The defendants agreed to carry these samples together with the plaintiffs themselves in consideration of the payment by the plaintiffs of their fares for the journey. The mere receipt of the goods for carriage would imply a contract for their carriage. That being so, s. 7 provides that the

(1) [1906] 2 K. B. 619.
(2) [1903] 1 K. B. 741; [1904] 1 K. B. 669.
(3) (1863) 13 C. B. (N.S.) 818.

liability which would prima facie be imposed on the company in the case of such a contract shall not be qualified except by a special contract signed by the person delivering the goods for carriage. There is nothing in the wording of the section to limit its application to cases where the company were under an obligation to carry the goods. The decision in *Stone & Co.* v. *Midland Ry. Co.* (1) turned on a different enactment, and has no application to the present case. [He cited *Cohen* v. *South-Eastern Ry. Co.* (2)]

C. A. Russell, K.C., in reply.

Cur. adv. vult.

May 7. LORD ALVERSTONE C.J. read the following judgment:— This is an appeal from a decision of Kennedy and Bray JJ. affirming the decision of the judge of the Manchester County Court in an action brought by the plaintiffs against the Lancashire and Yorkshire Railway Company in respect of the loss of certain trade samples of cigars which belonged to the plaintiffs, and were, in fact, being carried by the defendants from Huddersfield to Belfast, via Fleetwood, and were lost by the negligence of the defendants' servants. The defendants allege that the goods were being carried by them on the condition that the company should be relieved from all liability for loss, damage, misdelivery, or delay. The County Court judge and the judges of the King's Bench Division decided that, there having been no signed contract, the company are not entitled to rely upon this condition, having regard to the provisions of s. 7 of the Railway and Canal Traffic Act, 1854.

The plaintiffs, who were commercial travellers, travelled as third-class passengers, and the samples in question formed, as I have said, part of their luggage. The notice upon which the question turns was contained in the railway company's time-tables under the heading of "Passengers' Luggage." The first part of the notice stated that third-class passengers were entitled to 100 lb. per passenger of personal luggage only (not being merchandise or other articles carried for hire or profit) free of

(1) [1903] 1 K. B. 741; [1904] 1 K. B. 669.

(2) (1877) 2 Ex. D. 253.

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charge. At a later part of the same page the notice stated that commercial travellers and certain other classes of travellers were allowed to take free of charge $1\frac{1}{2}$ cwt. per passenger on the condition that the company was relieved from all liability for loss, damage, misdelivery, or delay. Certain articles were further specified as being things which commercial travellers were not allowed to take as portions of their luggage or samples. The excepted articles did not include cigars.

It was contended on behalf of the railway company that, inasmuch as there was no legal obligation upon the defendants to carry these samples as passengers' luggage at all, and, apart from the permission, they could have refused so to carry them as such, the plaintiffs must be regarded for the purpose of this action as mere licensees, and that, the licence given to them to carry these cigars being on the terms that the company should be relieved from all liability for loss, damage, misdelivery, or delay, the plaintiffs could not recover. It was further contended on behalf of the railway company that there was no contract to carry these samples at all. On behalf of the plaintiffs it was contended that upon the above facts there was a contract by the company to carry these samples as part of the passengers' luggage, and that the case came within the express words of s. 7 of the Railway and Canal Traffic Act, 1854.

The words of that section are, so far as they are material, that "every such company"—that is, a railway company—"shall be liable for the loss of or for any injury done to . . . any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void." Then follow provisions allowing special contracts to be made upon the terms, among others, that they shall be signed by the party delivering the goods to the railway company.

In my opinion it cannot be seriously contended that in this case the goods were not being carried under a contract by the railway company as carriers. They formed part of the passengers'

luggage, and the consideration for carrying the passenger and his luggage is the price paid for the ticket. The condition or notice is not that the excess weight will not be carried as passengers' luggage, but expressly says that a third-class passenger who is a commercial traveller will be allowed to take with him free of charge 1½ cwt., and the terms of the condition under which the company seek to be protected relate to the whole of that passenger's luggage. The condition further shews that samples, when carried, not being prohibited articles, are to be carried as passenger's luggage. In my opinion, therefore, there was evidence of a contract by the company to carry the passengers and their luggage upon the journey in question, and, that being so, the railway company did receive the luggage under a contract to carry it.

It was urged by Mr. Russell that, because the railway company need not have made this concession, and might have declined to allow samples to be carried as passengers' luggage at all, or might, if they thought fit, have refused to allow more than the lesser quantity of luggage to be carried, the position so far as these samples were concerned was not one of contract, but of mere licence. It has been held in more than one case that s. 7 applies to passengers' luggage (see *Cohen* v. *South Eastern Ry. Co.* (1)), and in my judgment the section at least applies to all cases in which goods are being carried by a railway company under a contract of carriage, be they passengers' luggage or not. It was suggested that mere receipt by the railway company for the purpose of carriage would be sufficient to bring the case within the section. I do not wish to express any opinion upon that point; it is not necessary for the decision of the present case, and I do not wish to express any opinion upon what the true view would be, assuming that the Court should find upon the facts of any particular case that goods were being taken by the plaintiff as a mere licensee, and not being carried by the railway company under a contract of carriage.

It was strenuously urged that this view is inconsistent with the case of *Stone & Co.* v. *Midland Ry. Co.* (2) I am wholly

(1) 2 Ex. D. 253.
(2) [1903] 1 K. B. 741; [1904] 1 K. B. 669.

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unable to follow this argument. In that case a railway company, not being bound to carry certain goods by passenger train, had published a notice that they would carry them on collection and delivery terms at a certain rate. The plaintiff, who availed himself of this offer, but did the delivery at the sending end, claimed a rebate off the rate in respect of the cartage done by him. In support of that argument it was attempted to say that there was a breach of s. 90 of the Railways Clauses Act, 1845, or s. 203 of the defendants' special Act. As I pointed out in my judgment (1), there were no facts proved which allowed such a case to be raised, because, first, there was no evidence that any person had been charged less than the plaintiff for the railway carriage, and, secondly, there was no statutory obligation on the part of the railway company to carry the goods by passenger train, and therefore s. 90 did not apply. The Master of the Rolls, in the Court of Appeal, expressly points out that, this being so, no question of breach of the equality clause arose. In my opinion the reasoning of this judgment is no authority whatever for the proposition that, where in fact a contract has been made for the carriage of goods as passengers' luggage in consideration of the payment of the rates authorized by statute, such contract is not subject to the provisions of s. 7 of the Act of 1854. That case, in fact, decided in both Courts that the railway company could not be compelled to carry goods on terms other than those on which they were willing to take them, unless there was some statutory obligation compelling them to do so. It has, in my opinion, no application to the case in which there is an express statutory enactment dealing with the rights of the company to contract themselves out of loss occasioned by the negligence of their own servants. In my opinion, this appeal should be dismissed.

FLETCHER MOULTON L.J. read the following judgment:—I am of opinion that the judgment of the Divisional Court in this case was right, and should be affirmed.

In my opinion the decision in this case turns entirely upon the construction of s. 7 of the Railway and Canal Traffic Act, 1854.

(1) [1903] 1 K. B., at p. 745.

This section has been subjected to much judicial criticism, but its construction, so far as is necessary for the purposes of this case, was finally determined by the decision of the House of Lords in the case of *Peek* v. *North Staffordshire Ry. Co.* (1), and may be expressed in the language used by Jervis C.J. in giving judgment in the cases of *Simons* v. *Great Western Ry. Co.* and *London and North-Western Ry. Co.* v. *Dunham* (2):—"The fair meaning of the section, as it seems to me, is this. The first branch of it declares that all notices, conditions, or declarations made and given by the company shall be null and void in so far as they go to release the company from liability for loss of or injury to goods, &c., in the receiving, forwarding, or delivery thereof, occasioned by the neglect or default of the company or its servants. But then it goes on to provide in the next branch that this shall not prevent the company from making such conditions which shall be adjudged, by the Court or judge before whom any question relating thereto shall be tried, to be just and reasonable. And further, though just and reasonable, such condition or 'special contract' shall not be binding unless signed by the person sending or delivering the goods." This language was adopted by Blackburn J. in advising the House of Lords in the case to which I have referred (3), and was specifically approved of by Lord Westbury and Lord Wensleydale, and impliedly approved of by Lord Cranworth, who with them constituted the majority in the appeal.

In the present case the goods were received by the railway company as part of the luggage of commercial travellers travelling on their line. It is not suggested that it was improper for them to include the package in question in their luggage, for it is obvious from the passage in the timetable relied upon by the railway company that the liberal allowance of luggage which is given in the case of commercial travellers is intended to include packages containing their samples, unless those samples come within a special description not applying in any way to the goods in question. It is also admitted that the goods were lost by the negligence or default of the company's servants,

(1) (1863) 10 H. L. C. 473. (2) (1856) 18 C. B. 805, 826, at p. 829.
(3) 10 H. L. C., at p. 509.

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and that there was no signed contract. These facts are, in my opinion, sufficient to establish the plaintiffs' case.

The defence is based on the contention that the defendants were not bound to carry the lost luggage as personal luggage in the passenger train by which the plaintiffs travelled, and that by their timetable they gave notice to them that they permitted them to take this liberal allowance of luggage without charge only on the condition that they were relieved from all liability for loss, damage, misdelivery, or delay. I will assume in their favour that notice of this being the condition on which the luggage was carried was brought to the knowledge of the plaintiffs, and, this being so, it would, in my opinion, suffice to establish a contract of carriage of the package on those terms if, after such notice, the plaintiffs availed themselves of the privilege. But, unfortunately for the defence, no such contract was signed by the plaintiffs, and therefore by the later provisions of the section it cannot be binding upon them or affect their right to enforce the liability imposed by the first paragraph of the section.

The defendants' counsel also contended before us that the operation of s. 7 of the Act of 1854 is confined to cases where the railway company can be compelled to carry the articles in the manner in which they were actually carried. I can find no justification for this contention. The section does not make the liability depend upon the obligation to receive the articles, but on the fact of receiving them.

The case of *Cahill* v. *London and North Western Ry. Co.* (1) does not support the defendants' contention. In that case the carriage of the goods was procured by the wrongful act of the plaintiff, who in breach of duty failed to inform the company that the package contained merchandise and not personal luggage. He was, therefore, unable to support his action, inasmuch as he was unable to take advantage of his own wrong. No such element is to be found in the present case.

During the argument much reliance was placed by the counsel for the defendants on the decision in *Stone & Co.* v. *Midland Ry.*

(1) 13 C. B. (N.S.) 818.

Co. (1) Speaking for myself, I am unable to see what bearing it has on the present case. In that case a railway company had instituted a service for carrying non-perishable goods by passenger train, such service including the collection and delivery of the goods at the houses of the parties by and to whom the goods were sent. They were not under any obligation to institute such a service. A trader, who availed himself of this service, but chose to take his goods to the station by his own vans, objected to being charged the full rate on the ground that he did not avail himself of the totality of the services rendered by the railway company. The Court decided that the railway company were not bound to institute the service at all, and that, if they did so, they were not bound to quote an alternative rate for those who did not avail themselves of the totality of the services offered, and that, therefore, their conduct in making the full charge to persons availing themselves of the service (whether or not they chose to do some of the work themselves) was no violation of such principles of equality of treatment as were binding upon the railway company by virtue of the general and special statutes regulating it. No question arose in that case upon any requirement that a certain class of contracts between railway companies and the public should be in writing, nor upon the meaning and effect of s. 7 of the Act of 1854. Inasmuch as, in my opinion, the present case depends solely on these matters, I am unable to see the bearing of the decision in the case of *Stone & Co.* v. *Midland Ry. Co.* (1) on the points we have to decide.

BUCKLEY L.J. Upon the question for decision on this appeal I have entertained great doubt, but, having read the judgments just delivered by the other members of the Court, I agree, in the facts of this case, with the conclusion at which they have arrived. The appeal will be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Upton & Britton, for Wilmshurst & Stones, Huddersfield.*

Solicitor for defendants: *A. de C. Parmiter, Manchester.*

(1) [1903] 1 K. B. 741; [1904] 1 K. B. 669.

E. L.

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April 26.

GROH, Appellant; HESKETH, Respondent.

Licensing Acts—Conditional Licence—Hours of opening—Application for occasional Licence—Licensing Acts, 1904 (4 *Edw.* 7, *c.* 23), *s.* 4; 1872 (35 *& 36 Vict. c.* 94), *s.* 29.

The respondent was granted in 1906, under s. 4 of the Licensing Act, 1904, a licence in respect of certain premises for the period of two years upon the condition that the premises should only be open for the sale of intoxicating liquors between the hours of noon and 2 P.M. During the currency of the licence the respondent applied to the justices in petty sessions, under s. 29 of the Licensing Act, 1872, for an occasional licence exempting him from closing the premises on December 17, 1906, between the hours of 7 P.M. and 11 P.M. The justices granted the occasional licence asked for:—

Held, that they had power to do so.

Case stated by justices for the Upper Division of the Lathe of Sutton-at-Hone in the county of Kent.

On December 7, 1906, the respondent appeared before the justices and applied to them under the provisions of s. 29 of the Licensing Act, 1872 (1), to grant him a licence exempting him from closing certain licensed premises known as the North Pole, Dartford, in the county aforesaid, on December 17, 1906, between the hours of 7 and 11 in the evening.

The following facts were proved or admitted:—

The respondent was the managing director of Messrs. J. & E. Hall, Limited, engineers, of Dartford, and the holder of a six-day licence for the premises before mentioned.

(1) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 29: "If any licensed victualler . . . . applies to the local authority of a licensing district for a licence exempting him from the provisions of this Act relating to the closing of premises on any special occasion or occasions, it shall be lawful for such local authority, if in his discretion he thinks fit so to do, to grant to the applicant an occasional licence exempting him from the provisions of this Act relating to closing of premises during certain hours, and on the special occasion or occasions to be specified in the licence; and no licensed victualler . . . . to whom an occasional licence has been granted under this section shall be subject to any penalty for the contravention of the provisions of this Act relating to the closing of premises during the time to which his occasional licence extends, but he shall not be exempted by such occasional licence from any penalty to which he may be subject by any other provision of this or any other Act of Parliament"

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The licence was granted by the licensing justices for the Upper Division of the Lathe of Sutton-at-Hone, at the general annual licensing meeting held on February 2, 1906, for the period of two years, upon the conditions that the premises in question should only be open for the sale of intoxicating liquors between the hours of noon and 2 P.M. in the afternoon, and that the respondent paid 50*l.*, the amount assessed as the monopoly value of the said premises.

The licence was granted for the convenience of the work-people in Messrs. Hall's and surrounding works, and the amount of 50*l.* was, with the consent of the justices, reduced by the confirming authority to 20*l.*

It was stated on behalf of the respondent that before the granting of the licence the premises had been habitually used for suppers, dinners, and other entertainments of the like kind. On these occasions no intoxicating liquors could be obtained from the respondent, and the practice was for those attending such suppers, &c., to either bring, or cause to be brought, to the North Pole, intoxicating liquors purchased elsewhere. It was proposed to continue the holding of these entertainments, and, with a view of avoiding the necessity for the practice above mentioned, which was considered objectionable, it was desired that the justices should grant an occasional licence under s. 29 of the Licensing Act, 1872, in respect of December 17, 1906.

It was contended on behalf of the respondent that under s. 29 the justices had full power to grant the application.

On behalf of the appellant it was contended (*a*) that s. 29 did not apply to the licence in question, which had been granted under s. 4 of the Licensing Act, 1904 (1), inasmuch as s. 29 of the Act of 1872 applied only to those licensed premises which

(1) Licensing Act, 1904 (4 Edw. 7, c. 23), s. 4: "(2.) The justices, on the grant of a new on licence, may attach to the grant of the licence such conditions both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public . . . .

"(3.) The justices may, if they think fit, instead of granting a new on licence as an annual licence, grant the licence for a term not exceeding seven years . . . ."

"(5.) A licence granted for a term under this section may (without prejudice to any other provisions as to forfeiture) be forfeited, if any condition imposed under this section is not complied with . . . ."

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were subject to the provisions of that Act relating to the closig of premises, whereas the premises of the North Pole, although licensed, were not subject to those provisions, but were restricted to the two hours mentioned in the conditions attached to the licence; (*b*) that the justices, sitting in petty sessions, had no power to alter or vary in any way the conditions upon which the licence had been granted and the monopoly value assessed.

The justices overruled the contention of the appellant and granted the occasional licence asked for.

The question for the opinion of the Court was whether they were right in so doing.

Danckwerts, K.C., and *Cecil Fitch* (*George Elliott* with them), for the appellant. There is no power to grant an occasional licence under s. 29 of the Act of 1872 to a licensee of premises in respect of which a conditional licence has been granted under s. 4 of the Act of 1904, for to do so would be to dispense with those conditions, which the justices in petty sessions have no power to do. The occasional licence granted under s. 29 is a licence exempting the licensee from the provisions of the Act of 1872, as amended by the Act of 1874, as to closing time. In the present case the object of the application is to permit the opening of the premises between 7 and 11 P.M., that is to say, at a time at which the premises would not, under the Act of 1874, be required to be closed, and therefore this application clearly cannot be granted under s. 29, for it is not an application "for a licence exempting him from the provisions of this Act," i.e., the Act of 1872, as amended by the Act of 1874. Further, an occasional licence under s. 29 only exempts the licensee from penalties for the contravention of the provisions of the Act as to closing time, but he is not exempted from any penalty to which he may be subject by any other provision of the Act or of any other Act; and by sub-s. 5 of s. 4 of the Act of 1904 the penalties for a breach of the conditions of the licence is the forfeiture of the licence. The occasional licence would be no protection against forfeiture. If it had been intended that conditional licences granted under s. 4 of the Act of 1904 should be subject to the provisions of s. 29, a provision similar to that contained

in s. 7 of the Act of 1874 would have been introduced into the section.

The respondent did not appear.

LORD ALVERSTONE C.J. In this case the respondent was granted a licence of certain premises subject to a condition that the premises should only be open between the hours of noon and 2 P.M. The power of licensing justices to grant licences subject to conditions of that kind was conferred by s. 4 of the Licensing Act, 1904, and it is contended that, by implication, the holder of this licence is prevented from obtaining an occasional licence under s. 29 of the Licensing Act, 1872. That section provides that any licensed victualler may apply for a licence exempting him from the provisions of that Act as to closing time, and, in my opinion, if it is to be said that the grantee of a conditional licence under the Act of 1904 is deprived of the right of obtaining permission to have his premises open beyond the hours mentioned in the licence, it must be by reason of some provision in the Act of 1904 or of some condition in the licence itself. It is not suggested that there is any express provision in the Act of 1904 to that effect, and I think that it would be going too far to say that, because it is a condition of this licence that the premises shall only be open from noon to 2 P.M., the licensee is thereby debarred from obtaining an occasional licence under s. 29, and that the justices have no jurisdiction to grant him an occasional licence, though the existence of the condition may well be a matter for them to take into consideration in exercising their discretion. It may be that a licence could be granted under the Act of 1904 subject to a condition that the licensee should not be entitled to apply at any time for an occasional licence. That is a question which will have to be considered if it ever arises. It is perfectly true, as Mr. Danckwerts pointed out, that an occasional licence only exempts the licensee from penalties for the contravention of the provisions of the Act of 1872 as to closing hours, but that only means that the licensee still remains liable to all the general provisions of the Licensing Acts as to the manner in which the business of licensed premises is to be conducted. It was further contended that because the occasional

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Lord Alverstone C.J.

licence asked for in this case is to enable the premises to be open between 7 P.M. and 11 P.M., which is a time at which licensed premises are, in the absence of any conditions, legally open, the application is one which could not have been within the contemplation of s. 29. The argument is ingenious, but the answer to it is that the Act of 1904 provides that it is to be construed as one with the Licensing Acts, 1828 to 1902, and, that being so, the provisions of s. 29 of the Act of 1872 are, in the absence of any express provision to the contrary, applicable to licences granted under the Act of 1904.

For these reasons I am of opinion that this appeal must be dismissed.

DARLING J. I am of the same opinion. My view is that justices have power to grant an occasional licence notwithstanding that the licence has been granted, under the Act of 1904, subject to a condition that the premises shall only be opened for a certain limited time each day. But when an application is made in a case of this sort for an occasional licence I think that it is the duty of the justices to consider whether what is asked for runs counter to the terms of the conditional licence, and if they are of opinion that the effect of granting the application would be practically to reduce the conditions of the licence to a nullity, then the justices would be entitled, in the exercise of their discretion, to refuse to grant the occasional licence.

PHILLIMORE J. I have had some doubt as to what our decision ought to be in this case, but I do not disagree with the conclusion at which the Court has arrived.

Appeal dismissed.

Solicitors for appellant: *Maitlands, Peckham & Co.*

F. O. R.

DUNNING *v.* OWEN.

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May 1

Licensing Acts—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 3—*Sale of Liquor without Licence—Principal and Agent—Sale by licensed Agent on behalf of unlicensed Principal.*

Where intoxicating liquor is sold by retail by an agent on behalf of the owner, the sale is, for the purposes of s. 3 of the Licensing Act, 1872, which prohibits the sale of intoxicating liquors by an unlicensed person, a sale by the owner and not by the agent; and, if the owner is not duly licensed to sell intoxicating liquor, the fact that the agent who conducted the sale was so licensed affords him no defence.

Case stated by the stipendiary magistrate of Liverpool.

The respondent was summoned under s. 3 of the Licensing Act, 1872, for having sold beer without being duly licensed. At the hearing of the information the following facts were proved or admitted :—

The respondent, having entered into a contract to supply refreshments, including intoxicating liquor, at an exhibition to be held at St. George's Hall, Liverpool, arranged with one Thomas Jenkins, a person licensed to sell wine, beer and spirits to be consumed on and off the premises at 48, Barnett Street, Liverpool, that Jenkins should obtain an occasional licence for the sale of intoxicating liquors at the said hall during the exhibition. The respondent, who was not a licensed person, applied on behalf of Jenkins for an occasional licence, which was granted to Jenkins. On September 19, 1906, beer was sold at St. George's Hall by barmaids, who were ordinarily employed by Jenkins in his business at 48, Barnett Street, but who for the time that they were at St. George's Hall were paid by the respondent. The beer so sold was sent to St. George's Hall by the order of the respondent, who subsequently paid for the same. The proceeds of the sale were put into the till at the bar, and were afterwards taken away by Jenkins' son, who was in the employ of the respondent. The respondent was from time to time present in the room on the day on which the sale took place, but did not with his own hands sell any beer or in any way interfere with or control the sale thereof. Jenkins attended at the bar and personally

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sold beer, and was in control of the bar and serving staff, but he was not in any way remunerated for such services, nor did he receive a share of the profits of the sale.

On behalf of the appellant it was contended that the fact of the beer being the respondent's beer, the barmaids being paid by him, and the proceeds being received by him, or on his behalf, constituted a sale by the respondent.

On behalf of the respondent it was contended that the above facts did not constitute an offence against the section.

The cases of *Peckover* v. *Defries* (1) and *Williamson* v. *Norris* (2) were referred to.

The magistrate held that no offence had been committed, and dismissed the summons.

Leslie Scott, for the appellant. Sect. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), provides that "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same," and that "Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail" shall be subject to certain penalties. As the respondent had himself no licence to sell intoxicating liquors by retail, the presence of another person who had a licence cannot avail him. The person to which the section refers as being the seller is the owner of the liquor sold. He must be the contracting party. Where liquor is sold by an agent on behalf of a principal with the principal's authority, it is the principal, and not the agent, who is the seller for the purposes of the section. In *Williamson* v. *Norris* (2), where the respondent, a servant of the House of Commons, sold liquor, the property of the House, without a licence at a bar within the precincts of the House, it was held that he was not guilty of an offence under the section. Lord Russell of Killowen C.J. there said: "The sale struck at is a sale by the master or the principal." In *Peckover* v. *Defries* (1) a man named Newton, being licensed, resided on the licensed premises, which he held as tenant to a Mrs. Defries. He took no part in the conduct of the business of selling the liquor, which was wholly conducted by Mrs. Defries and her

(1) (1906) 23 Times L. R. 20. (2) [1899] 1 Q. B. 7.

husband, neither of whom was licensed. There was some evidence that the Defries supplied the capital and that the business and the liquor belonged to them. The Defries were charged with selling liquor without a licence and Newton with abetting them in so doing. It was held upon the above facts that the magistrate was not justified in dismissing the informations merely because there was a licensed person residing on the premises, for that it is an offence for an unlicensed person to sell his own liquor on licensed premises under the cloak of another person's licence. No doubt the effect of a decision that an unlicensed person cannot lawfully sell intoxicating liquor belonging to him through the agency of a licensed manager may affect the legality of the business carried on in a very large number of the hotels and public-houses throughout the country. It may be that if the owners of an hotel and of the liquor sold there are an incorporated company the Act may not apply to them, upon the ground that a corporation is not a "person" within the meaning of the Act, not being capable of suffering imprisonment for an offence, and that consequently it may be lawful for an unlicensed company to sell through a licensed manager. But in all cases in which an unincorporated firm of brewers puts a manager in to conduct the business on their behalf, it would follow that the business was illegally conducted. The fact, however, that the consequences would be far-reaching cannot affect the meaning of the word "sell" in s. 3.

Rigby Swift, for the respondent. The object of s. 3 was to secure that the person who is in actual control of the premises where the sale takes place shall be licensed. What the Act strikes at is the physical act of selling by an unlicensed person. It is not necessary that he should sell his own liquor. If the person on the spot having the management of the house and conducting the sale of the liquor is licensed that is sufficient to satisfy the requirements of the Act. In *Peckover* v. *Defries* (1) the licensed person took no part in the management of the premises or in the sale of the liquor. Contracts between firms of brewers and their salaried managers of public-houses relating to the sale of beer on the brewers' account have frequently been

(1) 23 Times L. R. 20.

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before the Courts and treated as good, whereas if the contention of the appellant is right the Courts ought to have treated them as illegal and void. Again, auctioneers would never be able to sell by auction goods of a kind requiring an excise licence if the fact that the goods belonged to a person not having such a licence rendered the sale an unlicensed one.

[PHILLIMORE J. That difficulty may be got over by the fact that the auctioneer has a special property in the goods that he sells.]

DARLING J. In this case the respondent, having contracted to supply refreshments, including intoxicating liquors, at a certain exhibition, arranged that one Jenkins should obtain an occasional licence for the sale of intoxicating liquors at the exhibition. Certain beer was supplied by the respondent and was sold at the exhibition by barmaids employed by Jenkins, the proceeds of the sale being handed over to the respondent. The respondent had no licence to sell intoxicating liquors, and the question is whether upon these facts he was properly charged with selling such liquor without being duly licensed. Now it is perfectly plain that the respondent did not engage Jenkins as a sub-contractor to carry out that portion of his contract which related to the supply of intoxicating liquors, but he retained the whole contract in his own hands and engaged Jenkins to sell the liquor on his account. But it is said that the respondent did not sell the liquor within the meaning of s. 3, because the "person selling" within the meaning of that section is the person who physically conducts the sale to the consumer and controls the premises where the sale takes place. That contention is negatived by the case of *Williamson* v. *Norris* (1), which decided that a person who as agent or servant of another hands the liquor to a customer and receives the payment for it is not the person who is required to have the licence. In that case the question was whether a waiter in the employment of the House of Commons, who sold liquor at a bar in the House on behalf of the Kitchen Committee, required a licence, and it was held that he did not. The question was not there raised whether the waiter's principals required a licence. But the reasoning which shewed that the waiter did not

(1) [1899] 1 Q. B. 7.

require a licence went to shew that his principals, unless there was a peculiar exemption attaching to the House of Commons, did require a licence. Lord Russell C.J. there said: "I am of opinion that the true meaning of the section is that the sale which is prohibited must be a sale by the person who ought to be licensed. Everyone knows that a barman or waiter is not a person licensed. The sale struck at is a sale by the master or the principal." The person who sells for the purposes of the section is the person to whom the liquor belongs and on whose account it is sold. Here the property in the liquor was in the respondent, and it was sold on his account. But then it was said that it is enough if the agent has a licence, and the case of *Williamson* v. *Norris* (1) was distinguished on the ground that there nobody had a licence. That distinction is, however, to my mind immaterial. The principal, who is the "person selling," cannot shelter himself under the licence of his agent, for the section expressly says that the offence consists in a person selling intoxicating liquor "which he"—that is, the person selling—"is not licensed to sell by retail." The appeal must be allowed.

PHILLIMORE J. I am of the same opinion. The case of *Peckover* v. *Defries* (2) shews that you cannot avoid the provisions of the Licensing Act by keeping on the premises a licensed person as a sort of tame animal. That is all the bearing which that case has on the present. The case which is much more to the point is that of *Williamson* v. *Norris* (1), which decided that a sale for the purposes of the Licensing Act means exactly the same thing that it means for any other purpose, and that where a sale is effected by an agent on behalf of a principal the seller is the principal and not the agent. Here the principal was the respondent, and the fact that he employed as his agent a man who had a licence no more protected him than the fact that the defendants in *Peckover* v. *Defries* (2), if they were really the principals, as they probably were, had on the premises a man who was licensed, protected them.

Appeal allowed.

Solicitors for appellant: *F. Venn & Co., for Pickmere, Liverpool.*
Solicitor for respondent: *Hands, for E. Berry & Co., Liverpool.*

(1) [1899] 1 Q. B. 7. (2) 23 Times L. R. 20

J. F. C.

1907
May 3.

KETTLEWELL *v.* REFUGE ASSURANCE COMPANY.

Insurance, Life—Fraud of Insurance Agent—Avoidance of Policy—Recovery back of Premiums.

By a policy of life insurance the defendants, in consideration of the payment by the plaintiff of a weekly premium, contracted to pay to the plaintiff a certain sum upon the death of a third person. After the policy had been on foot for a year the plaintiff proposed to let it lapse, whereupon the defendants' agent, with the view of inducing her to continue the payment of the premiums, falsely, and without the authority of the defendants, represented to her that if she continued paying the premiums for four more years she would be entitled to a free policy, that is to say, that, though the policy would remain in force, she would on the expiration of that period have no further premiums to pay. Relying on that representation, she continued to pay the premiums for the further period of four years, but on the expiration of that period the defendants refused to give her a free policy. In an action brought to recover back the premiums paid by her since the date of the false representation made, the defendants contended that, as during the whole of the four years she was protected against the contingency of the life insured dropping, there had not been a total failure of consideration, and that the policy could not be treated as void:—

Held that, the contract contained in the policy being under the circumstances voidable at the plaintiff's option, the fact of the defendants having been at risk during the four years was no bar to the exercise of her option to avoid it, and that the premiums consequently could be recovered back.

Appeal from the Louth County Court.

The plaintiff Sarah Kettlewell, by a policy of life insurance dated February 18, 1901, effected an insurance with the defendant company upon the life of James Kettlewell for the sum of 13*l.* 16*s.*, which sum the defendants thereby contracted to pay to the plaintiff upon the death of James Kettlewell in consideration of the payment by her of a weekly premium of 1*s.* during his life. The plaintiff paid the premiums for a year, but in April, 1902, finding the continued payments to be more than she could afford, she called on one Cowling, the defendants' district superintendent, and proposed to let the policy lapse. He advised her to keep on paying the premiums until the expiration of five years from the date of the policy, and told her that then she would be entitled to a free policy, that is to say, that she would not be required to pay

any further premiums as a condition of keeping the policy on foot. A similar representation was made to her by one Baumber, another of the defendants' agents, with the view of inducing her to continue the payment of the premiums. The representations so made by the defendants' agents were untrue to their knowledge, and were made without the authority of the defendants. Relying upon those representations, the plaintiff continued to pay the premiums down to February, 1906, when she claimed to have a free policy, but the defendants refused to give it her. She then brought the action to recover back the premiums paid by her.

The evidence of the defendants' inspector was to the effect that the defendants' agents were employed only for the purpose of procuring proposals for policies. Those proposals had to be submitted to the defendants' chief office. The agents had no authority themselves to make any contract for the defendants.

The county court judge directed the jury that if the defendants' agents had been guilty of fraud, and the defendants had benefited by that fraud and retained the premiums, they thereby ratified their agents' act, even though it was outside the scope of their authority. The jury found a verdict for the plaintiff for the sum of 10*l.* 8*s.*, being the amount of the premiums paid since the date of the false representations made, and judgment was entered accordingly.

The defendants appealed.

Manisty, K.C., and *Nield*, for the defendants. The action to recover back the premiums as money had and received to the plaintiff's use will not lie unless there has been a total failure of consideration. And here there was not a total failure, for during the whole of the time during which the premiums were being paid the defendants were subject to the liability of having to pay the money secured by the policy in the event of the death of the person whose life was insured. A contract which is obtained by fraud is voidable only and not void, and it can be avoided at the election of the defrauded party only if the other party can be restored to the status quo ante, and a policy of insurance is no exception to this rule. It is too late to rescind the contract if the party desirous of doing so has already had the consideration

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for which he contracted. Here the plaintiff had all the consideration which the defendants by their policy contracted to give her, inasmuch as they were at risk during the whole of the five years. The plaintiff is in substance seeking to introduce into the contract a further consideration for the payment of the premiums beyond that appearing upon the policy itself. The defendants' agents were in fact purporting to make a new contract with the plaintiff, and in so doing they were acting outside the scope of their authority.

[PHILLIMORE J. referred to *Duffell* v. *Wilson* (1), where the defendant, in consideration of a premium, insured the plaintiff against the risk of being drawn in the militia ballot under a certain statute before February 1, 1808, and stated in terms in the form of receipt given by him that by that date all ballotings under the Act were directed to cease. This statement turned out to be a mistake, and in fact the plaintiff was drawn for the militia subsequently to the date named. It was held that he was entitled to recover back his premium.]

That is a different case. There the contract was not merely voidable, but void. The plaintiff never got the security for which the premium was paid. The risk was a wholly different one from that which was intended to be contracted for.

[PHILLIMORE J. If an agent employed by a landlord to procure a tenant for a house on certain terms makes without authority a false representation as to the drains with a view to induce a person to take the house, can the landlord hold the tenant to his lease?]

No, but if the tenant has occupied the house for a portion of the lease before discovering the representation to be false and has paid his rent, though he may refuse to continue the tenancy he cannot recover back the rent which he has paid. That is the case here.

[BRAY J. referred to Arnould's Marine Insurance, s. 1256, 7th ed. p. 1422.]

The defendants' agents, in making the representation which they did, were not acting within the scope of their employment. The judge did not leave that question to the jury, nor if he had done

(1) (1808) 1 Camp. 401.

so was there any evidence to support a finding to that effect. The agents' only authority was to procure proposals for policies. They had no authority to make contracts of insurance themselves. The plaintiff's case cannot be supported on the ground taken by the county court judge that the defendants ratified the act of their agents by their retention of the premiums. The defendants cannot be held to have ratified the agents' act unless they had notice of the fraud at the time of the reception of the premiums; it is not enough that subsequently to notice they retained them. In *Freeman* v. *Rosher* (1), where a broker employed by a landlord to distrain took away and sold a fixture and paid the proceeds to the landlord, who received them without notice of the irregularity, it was held that the mere retention by him of the proceeds after notice was no ratification of the broker's wrongful act.

Giveen, for the plaintiff, was not called upon.

PHILLIMORE J. In this case two points have been argued on behalf of the defendants. The first was that it is not now open to the plaintiff to recover back the premiums which she paid because she has had at any rate a part of the benefit that she contracted for, and that, as the consideration has not wholly failed, she cannot sue for the premiums as money had and received to her use. The answer to that contention, I think, is that in the true view of the facts it is open to her to say the policy never attached. If the policy was procured by fraud it is open to her to take up that position, and we need not consider what would have happened if during the five years when she was paying the premiums the life which she had insured had dropped and she had come to claim the money secured by the policy. No doubt she would have got the money, for no Court would allow the defendants to suggest by way of defence that the policy had never attached because some person acting on their behalf had made a representation so false as to render the contract voidable at the plaintiff's option. If Mr. Manisty's contention were sound, it would, I think, be difficult to support some of the cases on marine insurance in which the assured, having sued both for a loss under the policy

(1) (1849) 13 Q. B. 780.

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Phillimore J.

and for the return of the premiums, has been held entitled to recover the premiums but not the loss. The case of *Duffell* v. *Wilson* (1) seems to be directly in point in the plaintiff's favour. There the plaintiff, who was liable to be drawn for the militia and was desirous of insuring himself against that liability, was induced to insure with the defendant by a representation of the defendant that if he would insure himself for a period of three months at a certain premium at the end of that time all risk of his being drawn by ballot would be gone, that he had only got to protect himself for that period, and then he would be safe. In fact after that period of three months had expired he was drawn, the representation having been untrue. He then sued for the money secured by the policy, contending that it did not lie in the mouth of the defendant to say that the policy was not still running. Lord Ellenborough C.J. said that as the policy had in fact expired the plaintiff could not recover the amount secured, but that as there had been misrepresentation on the part of the defendant, which rendered the contract voidable, he was entitled to recover back the premiums as money had and received to his use. Therefore Mr. Manisty's first contention fails.

Then his second point was that the agent had no authority to make the representation. No doubt he had no authority to make a fraudulent misrepresentation; but that is not enough, because if it was within the scope of his authority to make representations at all with the view of procuring a policy or a renewal of premiums, then, according to the decision in *Mackay* v. *Commercial Bank of New Brunswick* (2), if in the course of the exercise of that authority he made a false representation, his principals would have to make it good. Mr. Manisty says, however, that in this case the agents were only employed to act for the defendants for particular purposes, and that in making the statements that they did they were acting outside the scope of their employment, so that they ought to be treated for the present purpose as strangers to the defendants. But I think that this contention cannot be supported. If a principal appoints a person as his agent to obtain bargains, any representation which the agent makes with the object of obtaining a bargain, and

(1) 1 Camp. 401. (2) (1874) L. R. 5 P. C. 394.

which results in a bargain being obtained, is one which the principal must make good in the sense that he cannot retain any benefit which the agent may have procured for him by means of that representation if it turns out to have been untrue. Suppose the case of an agent employed to let flats or lodgings upon the terms of a carefully and precisely drawn contract of tenancy, the terms of which are intended to be exhaustive, so that the agent has no authority to do more than to get intending tenants to sign the forms of contract, and suppose that in order to induce a person to take a flat he makes a representation which is untrue, not necessarily false to his knowledge, but untrue in fact, and that the person on the faith of it signed the contract, the landlord could not after the untruth of the agent's statement had been brought to his knowledge hold the person to his bargain. I am of opinion, therefore, that Mr. Manisty's second point also fails, and that the judgment must be affirmed.

BRAY J. I am of the same opinion, and for the same reasons. We do not decide that the defendants are bound by the agents' representations so as to make them liable for damages, for it is not necessary to decide that here. What we decide is that the defendants cannot keep the premiums which the plaintiff was induced to pay by the fraud of the agent.

Appeal dismissed.

Solicitors for appellants: *Horwood & Sons.*

Solicitors for respondent: *Clarkson, Greenwell & Co., for J. Barker, Great Grimsby.*

J. F. C.

1907
May 9, 10.

ANDERSEN *v.* MARTEN.

Insurance (Marine)—Warranty of Freedom from Capture—Capture of Ship—Condemnation—Relation back of Title of Captors.

Although the capture of a ship by belligerents does not of itself divest the owner's property in her, upon the ship being subsequently condemned by a prize court the title of the captors relates back to the date of the capture.

TRIAL before Channell J. without a jury.

By a policy of marine insurance underwritten by the defendant, the plaintiff, a shipowner of Hamburg, insured the disbursements on his ship *Romulus* for a period of twelve months from January 12, 1905. The policy, which was in the form of an ordinary Lloyd's policy, had attached to it the following, amongst other, clauses : 4. "Warranted free from all average, being against the risk of total loss only. A total loss or constructive total loss paid by underwriters on hull and machinery to constitute a total loss under this policy." 5. "Warranted free from capture, seizure and detention, and the consequences of hostilities." In October, 1904, during the progress of the war between Russia and Japan, the plaintiff entered into a contract with a Russian firm for the sale and delivery of coals by the plaintiff at Vladivostock, and in pursuance of that contract he loaded the *Romulus* at Cardiff with a full cargo of coals, and she sailed from that port on December 11, 1904. As the ship, carrying contraband of war, was liable to capture and condemnation by the Japanese, she proceeded by a circuitous route, the master's instructions being to keep well to the east of Japan and then to pass between the Kurile Islands, to the north of Japan. On February 21 she reached the Urup Straits, in the Kurile Islands, where she encountered large quantities of floating ice, which damaged the plates in her bows and caused her to spring several leaks. The crew managed to partially stop the leaks, but, being prevented from proceeding further by the extent of the icefields, she turned back. The leaks broke open again, and it was necessary to keep the pumps going. From time to time the pumps got choked with the coal dust which was mixed with the water. On February 23 the forepeak

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was full of water, and the bulkheads were leaking, so that it was no longer possible to keep the ship dry. In consequence the crew became mutinous, and the master, to pacify them, promised to put into the first Japanese port, and accordingly steered for Hakodadi, in the island of Yezo. The vessel was in a very dangerous condition, but it was hoped to reach Hakodadi in safety. On the morning of February 26 the *Romulus* had reached the Tsugaru Straits, which separate the two islands of Japan, and was making for Hakodadi as a port of refuge. When about thirty or forty miles from that port she was stopped by a Japanese cruiser, and a Japanese guard, consisting of two officers, two engineers, and about twenty seamen, was sent on board her. The Japanese officers came to the conclusion that she was capable of keeping afloat for a few days, and decided to take her to the naval port of Yokosuka, where there was a prize court. The captain and crew were ordered to navigate the ship under the directions of one of the Japanese officers. About noon on the same day the *Romulus* got under way and proceeded down the east side of Nipon towards Yokosuka, keeping near the shore for safety. As the day went on the wind increased in force and the sea rose, with the result that the water came in faster through the leaks, and at the same time the pumps got choked. That night, in consequence of the dangerous condition of the ship, it was decided to put her into a bay with the intention of beaching her. Before she reached the place intended she struck the ground heavily on the morning of February 27, and, as it was impossible to get her off, she was steered full speed on to the beach, where she broke her back and became a total wreck. On March 2 the master and officers were put on board a Japanese steamer and taken to Yokosuka, where an investigation was held into the circumstances attending the capture. On May 17 the *Romulus* was condemned as a prize by the Japanese prize court at Yokosuka. The action was brought upon the policy in respect of a total loss of disbursements by perils of the sea.

J. A. Hamilton, K.C., and *Balloch*, for the plaintiff. The ship was not lost by capture within the meaning of the warranty. Capture of itself is not enough. There must be a loss by capture;

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and capture does not involve such a loss before condemnation. But before she had been condemned as prize she had been lost by the perils of the sea. Under those circumstances the plaintiff can recover on the policy. For the purposes of considering whether a ship has been lost by perils insured against the proximate cause must be looked at. Therefore the capture was immaterial. At the time when she became a wreck she was still in the possession of her owner, being navigated by her master and crew.

Scrutton, K.C., and *Bailhache*, for the defendant. There was a loss by capture the moment the prize crew were put on board. The Japanese officers took charge of the ship, and she was from that time navigated under their directions and control. "Until the capture becomes invested with the character of prize by a sentence of condemnation the right of property is in abeyance or in a state of legal sequestration": Wheaton's International Law, 4th Eng. ed. s. 359 b. But upon condemnation the loss relates back to the date of the seizure. What the prize court has eventually to decide is whether the capture was good or not, which implies that if it was good the property was lost at the time of the capture. Secondly, if the plaintiff did not suffer a loss by capture, but by perils of the sea, still that loss was a consequence of hostilities, and therefore equally the plaintiff cannot recover. The case of *Ionides* v. *Universal Marine Insurance Co.* (1) well illustrates what is to be deemed a consequence of hostilities. There during the American Civil War a cargo on board a Federal ship was insured against perils of the sea by a policy containing a warranty that it was "free from all consequences of hostilities." Owing to the act of the Confederates in extinguishing a certain light the ship ran ashore, where she eventually broke up, and the cargo on board was lost. Of that cargo so lost a part might have been saved in the interval between the ship running ashore and the breaking up, but for the interference of the Confederate troops. It was held that the insurers were liable for so much of the cargo as was incapable of being saved, the proximate cause of the loss being a peril of the sea, and not the hostile act of the Confederate troops in extinguishing the light; but that they were not liable for so much as would

(1) (1863) 14 C. B. (N.S.) 259.

have been saved but for the interference of the troops, that being a loss in consequence of hostilities within the warranty. There Erle C.J. in the course of his judgment said: "I will put an instance of what I conceive to be a 'consequence of hostilities' within the meaning of this policy. Suppose there was a hostile attempt to seize the ship, and the master in seeking to escape capture ran ashore, and the ship was lost, there the loss would be a loss by the consequences of hostilities within the terms of this exception. Or suppose the ship chased by a cruiser, and to avoid seizure she gets into a bay where there is neither harbour nor anchorage, and in consequence of her inability to get out she is driven on shore by the wind and lost, that again would be a loss resulting from an attempt at capture and would be within the exception." Here the seizure of the ship by the Japanese was the proximate cause of her being wrecked. At the time of the seizure she was capable of being saved if she had gone straight on to Hakodadi. The Japanese were of that opinion, or they would not have tried to take her to a more distant port. The act of the belligerents in taking her the longer journey directly exposed her to the perils by which she was actually lost.

Hamilton, K.C., in reply. In Arnould's Marine Insurance, 7th ed. s. 830, it is said that "It has long been the established rule of our law maritime that the property is not changed by capture in favour of a vendee or recaptor, so as to bar the original owner, till there has been a regular sentence of condemnation." No case has been cited to shew that merely putting a prize crew on board is a final loss by capture. Here, notwithstanding the presence of the prize crew, the ship remained in the possession and under the management of the captain just as much as a ship which is under an embargo. Nor was the ship lost in consequence of hostilities. The loss was the consequence of the stranding. All that preceded the stranding was as much unconnected with the loss as was the extinguishment of the light in *Ionides* v. *Universal Marine Insurance Co.* (1)

CHANNELL J. The claim in this case is on a time policy on disbursements in respect of the ship *Romulus*. The policy,

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which is in the form of an ordinary Lloyd's policy, and is expressed in the body of it to be against the usual perils, contains the following clause: "Warranted free from all average, being against the risk of total loss only. A total loss or constructive total loss paid by underwriters on hull and machinery to constitute a total loss under this policy." That in effect means that the disbursements insured are to be deemed to be totally lost if and when the ship is totally lost. Therefore the question raised in the case is substantially whether the ship was totally lost by the perils insured against. The policy also contained the clause "Warranted free from capture, seizure and detention, and the consequences of hostilities." Those words of course mean that, notwithstanding any words in the body of the policy to the contrary, the underwriters are not to be liable if the loss is from capture, seizure, or detention. In the case of *Ionides* v. *Universal Marine Insurance Co.* (1), which was cited in the course of argument, there is authority, if authority is needed, for the proposition that the words of the warranty against capture, &c., are to be construed in the same way as a policy against those events would be construed, and in particular that the words "consequences of hostilities" in the warranty mean the direct consequences of hostilities.

Now the facts of the case were as follows: The ship was bound for Vladivostock during the Russo-Japanese war with coal, and in order to avoid Japanese cruisers she took a course very much more to the north than she would ordinarily have gone, and then met with ice and got damaged. In one sense that damage from the ice was no doubt in consequence of hostilities, but it is agreed that it was far too indirect to be a consequence of hostilities within the meaning of a policy against damage from that cause, and consequently would not be within the warranty which I have to consider. The ship was seriously damaged and more or less in danger of foundering. Leaks were just kept under; sometimes they got a little better and sometimes a little worse, according as the coal dust choked the pumps on the one hand or stopped the leaks on the other. She gave up going to Vladivostock in the way in which she was going, and came near the

(1) 14 C. B. (N.S.) 259.

coast of Japan in order to get to Hakodadi, a port of refuge where she might be repaired. When she had got about thirty miles from that port she was stopped by a Japanese cruiser, which put a prize crew on board; and the Japanese officers, forming the judgment that she was in a sufficiently good state not only to get to Hakodadi, which was the nearest port, but also to have a chance of getting to another port further off where there was a prize court, took her in the opposite direction to that in which she had been going, with the view of taking her to the more distant port. On the way there the leaks got worse, and the officers ran the ship towards the shore with the intention of beaching her, but before they had any opportunity of selecting a good place to beach her she stranded. As they could not get her off, they drove her as far ashore as they could, and then she broke her back and became a total wreck. Shortly afterwards she was condemned in the Japanese prize court. The evidence of a surveyor who was sent to see the ship sufficiently establishes that she had become a total wreck at least two days before the date of her condemnation.

That the action of the Japanese officers when they put the prize crew on board amounted to a capture I think can hardly be disputed. No doubt the ship's captain and crew remained in one sense in charge of the navigation, but their movements were directed by the Japanese. The test whether it was a capture or not appears to be whether there was an intention to deprive the owner of his right of property. In Arnould's Marine Insurance, 7th ed. s. 829, capture is defined to be "a taking by the enemy as prize, in time of open war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken." The Japanese officers undoubtedly had the intention of depriving the owner of his property.

Upon these facts the question is whether the owner suffered a loss by perils of the sea, or whether he suffered a loss by capture which prevented him from subsequently losing the ship by perils of the sea. I think that most people, looking at the matter from a common sense point of view and apart from technicalities, would say that under the circumstances the owner lost his ship by capture, and that the Japanese captors afterwards lost their prize by

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shipwreck. If that is the correct view, then under this policy the plaintiff is not entitled to recover. If the effect of what took place when the Japanese officers came on board and directed the captain to take her down the coast in the opposite direction to that in which she was going, that is to say, towards the prize Court, was to divest the owner's property in the ship, then he had lost it and could not afterwards lose it again. From that moment he had no insurable interest in the ship. The ship itself was undoubtedly lost by the perils of the sea, but the question is Whose property was it at that time? If the property had passed from the original owner by the capture, he did not lose it; it was the loss of the Japanese who had taken it. I have examined the authorities on the subject, and I find that it is clear that capture without condemnation does not divest the owner of his property. I say "without condemnation," not "until condemnation," for I think that is the proper way of stating the rule. The matter is one which formerly was, and possibly still is, dealt with differently in different countries. Some countries had a rule that the property was divested as soon as the captors got their prize within the protection of their own coasts; but the English law always was that without condemnation the property did not pass. It was suggested in argument by Mr. Scrutton that although the property did not pass without condemnation, yet when there was condemnation the divesting of the property related back to the time of the capture; but he did not cite any authority for it, and I was at first inclined to think that it was a mere ingenious suggestion. But on looking into the matter I find in an old edition of Abbott on Shipping (11th ed. 1867, by Mr. Justice Shee, at p. 24) the following passage: "When by condemnation a complete title has vested in the captors the property in the prize relates back to the time of the capture, and an assignment by the captors in the mean time is valid." For that proposition three authorities are cited—*Stevens* v. *Bagwell* (1), *Morrough* v. *Comyns* (2), and *Alexander* v. *Duke of Wellington*. (3) That passage is omitted in the more recent editions of the book, but I think that the reason why it was omitted was that in 1864

(1) (1808) 15 Ves. 139. (2) (1748) 1 Wils. 211.
(3) (1831) 2 Russ. & My. 35.

an Act was passed relating to naval prizes and prize money, which Act the editor may possibly have regarded as superseding the older law upon the subject. I have looked at the three cases cited in Abbott and the proposition is undoubtedly there stated, but I am not sure that the decisions bear very much upon it. The third of those cases is clearly a case of military prize, and the first is half naval, half military, being a case of prize money arising out of the taking of a Dutch fort by a British ship of war. The decisions cannot be said to be exactly in point, as they relate rather to dealings with prize money than to direct dealings with a ship; but at the same time the proposition is there stated, and I think I ought to follow it and come to the conclusion that the true law is that, although mere capture in itself when there is no condemnation does not divest the property, when there is an adjudication of a prize court, which is an adjudication in rem binding on all the world, it is a decision not merely that the property has passed at the date of the decision, but that it did pass at the time of the capture, and its effect therefore may be described as relating back. On that ground, therefore, I must hold that the plaintiff is not entitled to judgment.

Under these circumstances it becomes unnecessary for me to deal at length with the defendant's contention that, even if the loss suffered by the plaintiff was not a loss by capture but by shipwreck, that loss was in consequence of hostilities. In support of that contention reliance was placed on a passage in the judgment of Erle C.J. in *Ionides* v. *Universal Marine Insurance Co.* (1), where he puts the case, which is extremely like the present, of a man-of-war chasing an enemy's merchant vessel and driving her into a bay where she ultimately goes ashore and is lost, and suggests that in that case the loss would be in consequence of hostilities. He was there dealing with the rule that it is the proximate and direct cause of the loss that must be looked at, and he thought that in the case he was putting the action of the man-of-war would be the direct cause of the loss. It may be that his illustration was not an apt one. His decision would not in any way conflict with my holding in the present case that

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the loss was not in consequence of hostilities. It was the indirect consequence, no doubt. It arose, just as much as the damage by collision with the ice arose, from the existence of hostilities. If the ship had not been taken by the Japanese prize crew where she was taken she would very possibly not have been wrecked at all, and on the evidence I think she would have had a good chance of getting to the port of refuge. But I think it was an indirect consequence only, and I do not think I could have decided the case on that ground in favour of the defendant. But that point becomes irrelevant if the first ground of decision is right.

Judgment for the defendant.

Solicitors for plaintiff: *Woodhouse & Davidson.*
Solicitors for defendant: *Crump & Son.*

J. F. C.

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[IN THE COURT OF APPEAL.]

THE WAKEFIELD AND DISTRICT LIGHT RAILWAYS COMPANY *v.* THE WAKEFIELD CORPORATION.

Rates—General District Rate—Assessment—"Land used only as a Railway"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-s.* 1 (*b*)—*Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48), *s.* 12, *sub-s.* 2.

A company were the owners of a light railway constructed under an Order made under the Light Railways Act, 1896. The railway, which physically resembled a tramway, was laid along certain open streets, and the Order, while preserving to the public their ordinary right of passage over the highway, provided that the company should have the exclusive use of the railway for carriages with flange wheels. The company having been assessed to the general district rate in respect of their occupation of the railway:—

Held, upon the construction of s. 12, sub-s. 2, of the Light Railways Act, 1896, that s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, applied to light railways; and that, notwithstanding the user by the public of the surface of the streets in exercise of their right of passage, the company were occupiers of land used only as a railway constructed under the powers of an Act of Parliament for public conveyance within the meaning of s. 211, and were consequently entitled to be

assessed to the general district rate in respect of the said railway at one-fourth only of its net annual value.

Decision of Divisional Court, [1906] 2 K. B. 140, affirmed.

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APPEAL from a decision of the Divisional Court upon a case stated by justices of Wakefield. (1)

A complaint was preferred by the Wakefield Corporation, the respondents, against the Wakefield and District Light Railways Company, the appellants, for non-payment of two general district rates made by the corporation on May 10, 1904, to which the appellants were assessed in the sums of 31*l.* 9*s.* 6*d.* and 8*l.* 12*s.* 8*d.* respectively.

At the hearing of the complaint it was proved or admitted that the said rates were duly made and demanded of the appellants, and that the appellants were therein rated in respect of certain light railways described in the rate as lines of rails. The said rails were laid and situate in certain public streets; the net annual value of the rails was 237*l.*, and the sums of 31*l.* 9*s.* 6*d.* and 8*l.* 12*s.* 8*d.* charged against the appellants in the said rates were calculated on the full net annual value of 237*l.* It was further proved that the appellants had tendered to the respondents the sum of 10*l.* 0*s.* 7*d.*, being the total sum charged by the said rates calculated on one-fourth part only of the said net annual value, and that the respondents had refused to accept the same. It was admitted that the appellants were in occupation of the lines of rails and the land occupied thereby.

The said lines of rails comprise railways Nos. 3, 6, 7, and 8, authorized by clause 10 of the Wakefield and District Light Railways Order, 1901, and lie entirely in certain streets within the city of Wakefield, which are highways dedicated to the public and repairable by the inhabitants at large, and are vested in the corporation of Wakefield as the urban authority pursuant to the Public Health Act, 1875. The traffic along the said lines of rails is worked by electricity on what is commonly called the overhead system, the current being conveyed to the vehicles by wires suspended from posts placed alongside of the streets. The vehicles are used for the conveyance of passengers and

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parcels, and the public are entitled to be conveyed along the lines of rails on payment of the rates and charges authorized by the said Order.

The material provisions of the Order were as follows :—

Sect. 17 : "Nothing in this Order or in any by-law made under this Order shall take away or abridge the right of the public to pass along or across every part of any road along or across which the railway is laid with carriages not having flange wheels or wheels suitable only to run on the rails of the railway."

Sect. 49 : "The company may use on the railway carriages with flange wheels or wheels suitable only to run on the rails of the railway, and subject to the provisions of this Order the company shall have the exclusive use of the railway for carriages with flange wheels or other wheels suitable only to run on the rails of the railway."

Sect. 50 : "If any person (except by agreement with the company or otherwise as by this Order provided) uses the railway or any portion thereof with carriages having flange wheels or other wheels suitable only to run on the rails of the railway such person shall for every such offence be liable to a penalty not exceeding twenty pounds."

It was contended on behalf of the respondents that the appellants were liable to pay in respect of the said rates sums calculated on the full net annual value of the said lines of rails, and that the land in which the said lines of rails are laid was not land used only as a railway, and that the said railway was not a railway constructed under the powers of any Act of Parliament for public conveyance within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. (1)

(1) Sect. 211 of the Public Health Act, 1875, provides : "With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect ; (namely,)

"(1). General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property, ascertained by the valuation list for the time being in force, or, if there is none, by the rate for the relief of the poor made next before

It was contended on behalf of the appellants that the said lines of rails and the land occupied thereby were used as a railway constructed under the powers of certain Acts of Parliament for public conveyance within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, because they were constructed and are used only under the Wakefield and District Light Railway Order, 1901, and the Wakefield and District Light Railways (Extensions) Order, 1902, which Orders are to be deemed special Acts by virtue of s. 12, sub-s 2, of the Light Railways Act, 1896 (1), for the purposes of the general enactments relating to railways, and that therefore the appellants ought to be assessed in respect of the said lines of rails and the land occupied thereby in the proportion of one-fourth only of the net annual value thereof.

The justices held that the land occupied by the said lines of rails was not land used only as a railway, and that the said railways were not railways constructed under the powers of an Act of Parliament for public conveyance, and that the appellants

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the making of the assessment under this Act, subject to the following exceptions, regulations and conditions; (namely,) . . . .

"(*b*) The . . . . occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

(1) By s. 12 (1) of the Light Railways Act, 1896: "The Clauses Acts, as defined by this Act, and the enactments mentioned in the Second Schedule to this Act, shall not apply to a light railway authorized by this Act except so far as they are incorporated or applied by the Order authorizing the railway.

"(2.) Subject to the foregoing provisions of this Act and to any special provisions contained in the Order authorizing the railway, the general enactments relating to railways shall apply to a light railway under this Act, in like maner as they apply to any other railway; and for the purposes of those enactments, and of the Clauses Acts so far as they are incorporated or applied by the Order authorizing the railway, the light railway company shall be deemed a railway company, and the Order under this Act a special Act, and any provision thereof a special enactment."

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were liable to be assessed in respect thereof on the full net annual value.

The questions for the opinion of the Court were:—

1. Whether the land occupied by the said lines of rails was or was not land used only as a railway constructed under the powers of an Act of Parliament for public conveyance within the meaning of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875.

2. Whether the said railways were or were not railways constructed under the powers of an Act of Parliament for public conveyance within the meaning of the said sub-section.

3. Whether the occupiers of the said land occupied by the said lines of rails were or were not entitled to the benefit of the partial exemption provided for in s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875.

The Divisional Court (Ridley, Darling and A. T. Lawrence JJ.) held that the land in respect of which the railway company were rated was land used only as a railway, and that this light railway was a railway constructed under the powers of an Act of Parliament for public conveyance within s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875; and that consequently the railway company were entitled to be assessed to the general district rate in respect of the railway at one-fourth only of its net value.

The Wakefield Corporation appealed.

Montague Lush, K.C. and *Clavell Salter, K.C.* (with them *W. Mackenzie*), for the corporation. First, this hereditament is not a railway within s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875. According to the popular meaning of the word it is not a railway, but a tramway. It runs through the public streets on rails flush with the ground; it is driven by the overhead electric system, and passengers are taken up and set down at any point along the line of route. It is in all outward physical aspects an ordinary street tramway. If the view of the Divisional Court is correct this curious anomaly will result, that an undertaking in the nature of a tramway, if it comes into existence under the sanction of the Tramways Act,

1870, by means of a provisional order, is rateable at its full value, but if it comes into existence under an Order of the Light Railway Commissioners it will obtain the exemption allowed by s. 211. But the nature of the hereditament cannot depend upon the origin of the power under which it comes into existence. In construing the exemption clause in s. 211 two principles are established—first, that the word "railway" must be construed according to its popular meaning; secondly, that regard must be had to the object of the Legislature in granting the exemption; and when one looks at the different kinds of property enumerated in that clause and notices what feature they have in common, it is obvious that the object of the Legislature was to make a deduction in favour of those classes of property which contribute largely to the payment, but do not enjoy the full benefit, of the rates. This reason does not apply to tramways, which enjoy to the full the lighting and draining of the streets and the protection and regulation of the traffic by the police. *Blackpool and Fleetwood Tramroad Co.* v. *Thornton Urban Council* (1); *South Wales Ry. Co.* v. *Swansea Local Board* (2); *Newport Dock Co.* v. *Newport Local Board* (3); *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority.* (4)

Secondly, this is not a railway constructed under the powers of an Act of Parliament within the exemption clause; it is constructed under an Order of the Light Railways Commissioners. Sect. 12, sub-s. 2, of the Light Railways Act, 1896, provides that the Order authorizing the railway shall be deemed a special Act "for the purposes of the general enactments relating to railways"; but that implies that it is not a special Act for all purposes, and s. 211, sub-s. 1 (*b*), of the Public Health Act is not a general enactment relating to railways within the meaning of s. 12, sub-s. 2. Those words were intended to apply only to Acts which had for their main object the regulation of railways, and they refer to Acts of the same class as those which are excepted from the section.

[*Danckwerts, K.C.* Independently of the question whether this Order is a special Act or not, this railway is constructed under

(1) [1907] 1 K. B. 568.
(2) (1854) 4 E. & B. 189.
(3) (1862) 2 B. & S. 708.
(4) [1892] 1 Q. B. 357.

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the powers of the Light Railways Act, 1896 : *Elve* v. *Boyton* (1) ; *Reg.* v. *Walker*. (2)]

Thirdly, the Light Railways Act, 1896, contains nothing which makes a light railway a railway within s. 211, sub-s. 1 (*b*), of the Public Health Act if it would not be so apart from the provisions of the Act of 1896, for the argument upon the construction of s. 12, sub-s. 2, applies to this point also ; and, apart from the provisions of that Act, this is not a railway, but a tramway. A light railway may be either a railway or a tramway, according to its nature, but it is not necessarily a railway because it is made under the Light Railways Act. At the time of the passing of the Public Health Act, 1875, tramways were known, and they are referred to in s. 147, but the Legislature did not think fit to extend the exemption to them because they were not within the reason of the exemption ; but the idea of constructing a railway, which is practically indistinguishable from a tramway, to run along the public streets of a town was not then known, and, looking at the matter independently of the Act of 1896, the Legislature could not have intended this modern invention to be entitled to the exemption.

[COZENS-HARDY M.R. referred to *Attorney-General* v. *Edison Telephone Co.* (3)]

Fourthly, the land occupied by the company is not land used only as a railway. That the word "only" applies to the word "railway" as well as to the preceding items mentioned in the exemption clause is established by *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority* (4) and by *Blackpool and Fleetwood Tramroad Co.* v. *Thornton Urban Council.* (5) No doubt, the railway company are rateable in respect of their occupation of the road by the tramway: *Pimlico, Peckham and Greenwich Street Tramway Co.* v. *Assessment Committee of the Greenwich Union* (6) ; *Melbourne Tramway and Omnibus Co., Ld.* v. *Mayor, &c., of Fitzroy* (7); but occupation for rating purposes is a different thing from the

(1) [1891] 1 Ch. 501.
(2) (1875) L. R. 10 Q. B 355.
(3) (1880) 6 Q. B. D. 244.
(4) [1892] 1 Q. B. 357.
(5) [1907] 1 K. B. 568.
(6) (1873) L. R. 9 Q. B. 9.
(7) [1901] A. C. 153.

user referred to in s. 211. The word "only" was inserted, not for the purpose of distinguishing warehouses and stations, but for the purpose of distinguishing railways made on private ground from railways placed on the highway. The railway company occupy the land, because they alone can use it in the only way in which it can be made productive; but the public have the right to use the surface of the land in common with the railway company, and that prevents the land from being used only for the railway. The Legislature could not have meant to say that the rails are only to be used as rails because they cannot be used in any other way, and if that is the meaning it is tautology. Therefore user in s. 211 means something different from occupation and refers to user by anybody, not user by the railway company.

Walter Ryde (*Danckwerts*, *K.C.*, with him), for the railway company. It is said that it would be a curious anomaly if a structure identical with this one, constructed under the Tramways Act, were liable to pay the full rates while this structure is liable to pay one-quarter. But the object of the Light Railways Act, 1896, was, for the purpose of promoting agriculture and other interests, to induce more people to construct such means of conveyance from one part of the country to another, and to give the investor a better chance of profit than he would have under the existing legislation. Thus by s. 5 power is given to the Treasury to contribute towards the construction of a light railway in certain cases. Again, the Light Railways Act contains no clause corresponding to s. 43 of the Tramways Act, 1870, empowering a local authority to purchase after twenty-one years upon the basis of the structural value in situ. All that the Act does is to provide, by s. 11, that the Board of Trade may insert such a clause, and the usual practice is said to be to give the local authority power to purchase at the end of sixty years, and then only upon paying full compensation. Then s. 13, which is in fact a betterment clause, gives an advantage to a light railway company as regards the acquisition of land, since it requires the arbitrator, in estimating the compensation, to take into account the extent to which the contiguous lands of the same proprietor may be benefited by the railway. These instances are sufficient to shew that the inten-

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tion of the Legislature was to place a light railway in a better position than a tramway. Then, what is the meaning of the general enactments relating to railways in s. 12, sub-s. 2, of the Light Railways Act? It is submitted that "general" means general as opposed to special, that "enactments" means not only an Act, but any section or clause of an Act, and that the definition as a whole includes any enactment of general application which relates to railways. If that is the true construction, then s. 211, sub-s. 1 (*b*), is such an enactment, and applies to light railways under the Act of 1896 in the same way as it applies to any other railways. Then, the only other question is as to the word "only." It is to be observed that this s. 211, sub-s. 1 (*b*), is an exemption clause. The charging words are contained in sub-s. 1, and the exemption is contained in clause (*b*). The natural reading of the exemption clause is to say that, if the occupier of certain property uses it in such a way that he is not likely to get as much benefit as the occupiers of some other classes of property would get from the rate to be levied under the section, then he is to be entitled to a certain exemption. The question is, What use does the person who is charged by the charging section make of the property in respect of which he is charged? The use which other people make of the property is for that purpose immaterial, or if material it tells in favour of the railway company in this case. It is conceded that if this line were laid on the exclusive property of the company they would get the benefit of the exemption; but it is said that if they have not the full beneficial user of the property, but must submit to the burden of allowing the public to pass over it and obstruct their traffic, they are to be excluded from the exemption. That cannot have been the intention of the Act of Parliament. What are the company rated for? They are rated for the exclusive right to have the groove in the rail kept free of obstruction and to run in that groove carriages having flange wheels. If that is so, the user of the surface by the public is immaterial, because it is not a user which makes anybody rateable. The user referred to in the exemption clause is the same user as that mentioned by Blackburn J. in the *Pimlico Case* (1), where he speaks of the

(1) L. R. 9 Q. B. 9.

exclusive right of user for which the tramway company were rateable. Therefore this is land used only as a railway.

Clavell Salter, K.C., replied.

COZENS-HARDY M.R. The appellants here, the local authority, allege that the Wakefield and District Light Railways Company are rateable upon the full amount charged in respect of the general rate, and are not entitled to the statutory abatement which is given to some railway companies by virtue of s. 211 of the Public Health Act, 1875. The material points for our consideration seem to be two—first, Does s. 12 of the Light Railways Act, 1896, bring s. 211 of the Public Health Act into operation with reference to light railways? Then, next, assuming that it does, What is the true meaning and effect of s. 211 itself as applied to a subject-matter like this? I do not pause to consider the question whether the line of railway which runs along the public streets of Wakefield, which is the line of railway alone we have to consider here, is a tramway or a railway for the purposes of this Act. It seems to me almost too plain for argument that it is a railway and not a tramway. A light railway constructed under the Act of 1896 is repeatedly spoken of as a railway. In this very s. 12 we find these words, that certain enactments, about which I shall have something to say, "shall apply to a light railway under this Act in like manner as they apply to any other railway," and there are to be found in the Act many differences of a substantial kind for the benefit mainly of a light railway company as compared with a tramway company formed and carrying on its operations under the Tramways Act, 1870. I therefore feel no doubt that we must approach this question having regard to the fact that we are dealing here with a railway and not a tramway within the meaning of the Act of Parliament. What does s. 12 say? [The Master of the Rolls read s. 12, sub-ss. 1 and 2.] It is argued that the only enactments relating to railways which are to apply to a light railway are the general statutes applicable to railways, and to railways only, and that you are not to include sections of a general as distinguished from a special character to be found in Acts of Parliament dealing not merely with railways, but with

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other matters. I am unable to assent to that view. The very exception in the proviso to sub-s. 2, viz., the Railway Passenger Duty Act, 1842, seems to me to shew that that is far too narrow a construction, for, when you look at that Act, the short title of which is the Railway Passenger Duty Act, 1842, it is quite plain that that was, even at the date when this Act of 1896 was passed, and having regard to omissions occasioned by intervening legislation, an Act dealing not merely with railways, but with stage carriages and matters of that kind, and with matters relating to stamp duty and probate. Even without the aid of that, my view is that those words "the general enactments relating to railways," fairly construed, must mean that an enactment in a statute not making special reference to any particular railway, but dealing with all railways without exception, is to apply to a light railway just as much as it is to an ordinary railway. Then the question arises, Is s. 211 a section of that kind? It seems to me that it is. It is an enactment which imposes the general district rates upon all kinds of property for the time being by law assessable to the poor rate, and it enacts that they are to be "assessed on the full net annual value of such property, ascertained by the valuation list for the time being in force, or, if there is none, by the rate for the relief of the poor made next before the making of the assessment under this Act, subject to the following exceptions regulations and conditions." Then clause (*b*) grants an exemption to land used only as a railway "constructed under the powers of any Act of Parliament for public conveyance." In my view that is a general enactment relating to railways—a general enactment in favour of railways, to the benefit of which these light railways are entitled. It is, therefore, now necessary to consider whether the facts of this case do or do not bring this light railway company into the position of claiming the benefit of that clause. I think there is great force in the argument which Mr. Ryde has presented to us, that you have here first of all a charging section imposing a charge on the occupier of all kinds of property liable to the poor rate and then an exemption for occupiers, and that must obviously be for the benefit of those persons who, but for the exemption, would have to pay the full rate. What, then, are the words which we

have to construe? "The occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance." Now, I assume that the word "only" applies not merely to the canal or towing-path, but to the railway. I do not think it is open to us to hold otherwise, having regard to the decision in the *Blackpool Case* (1), but, speaking for myself, I should without hesitation arrive at the same conclusion if the matter were open for my decision. Then, assuming that to be so, the words are, "The occupier of land used only as a railway constructed under the powers of any Act of Parliament for public conveyance." Going by steps, is this light railway a railway constructed under the powers of any Act of Parliament? It was strenuously argued by Mr. Lush that that was not the case, that there was no Act confirming the Order of the Light Railway Commissioners; but his attention was called to the case of *Elve* v. *Boyton* (2), and he no longer persisted in that view, and I understood Mr. Clavell Salter this morning to give up that contention. That leaves only this question, Are the company the occupiers of land used only as a railway? I think they are. The very foundation of the rateability of this light railway company, and of tramway companies, which are physically the same as this light railway company, is explained in the *Pimlico Case* (3) by Blackburn and Lush JJ. on this ground, not that they use the road as anybody else may use it, for that, of course, does not involve any possibility of rating the persons who use it, but that they have, by virtue of powers which are conferred upon them directly or indirectly by Parliament, an exclusive right to use the groove in the rails, and a flange constructed so as to fit into and go along the rails. That is an occupation within the old Statute of Elizabeth, and within the principle of rating law. It is only by virtue of that right of exclusive user that they become rateable at all, and when I come to the words "used only as a railway," it seems to me almost irresistible that the exemption given to the occupier who is taxable in the first part of the section is given in respect of the user by him of this land

(1) [1907] 1 K. B. 568. (2) [1891] 1 Ch. 501.
(3) L. R. 9 Q. B. 9.

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only as a railway. Now this railway company have got this parliamentary privilege which renders them liable to rating only for the purposes of their railway, and their exclusive right of user cannot be extended beyond. I do not feel pressed with the argument that other people are entitled to use the surface of the road. That does not seem to me really to have any bearing on the case, and it does not interfere with, or in any way destroy, that exclusive right of user which, and which alone, is the foundation of the rateability of the railway company.

For these reasons, which are substantially those which are given by the learned judges in the Divisional Court, I think that this appeal fails, and must be dismissed with costs.

VAUGHAN WILLIAMS L.J. I agree, for the reasons given by the three judges in the King's Bench Division. It seems to me that if you read the three judgments you will find that they cover every one of the points which have been urged in favour of the local authority. I should not really add anything to the judgment of the Master of the Rolls if it were not for this, that in the course of the hearing arguments have been addressed to us which seemed to me to involve a certain amount of confusion as to the principles of rating. Here in the Public Health Act one has in s. 211, sub-s. 1, the words "general rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor." That throws us back upon the Statute of Elizabeth, and one knows that under that statute the only property which is assessable to a rate for the relief of the poor is land, and then when one comes to deal with clause (*b*) of sub-s. 1 of s. 211, one finds the word "land" used, and, according to my understanding, that means land which is assessable to rates for the relief of the poor. Then one has to consider what constitutes land which is so assessable. One knows from any number of cases that the right of exclusive occupation of land, whether it is the surface of the land, whether it is something under the land, or whether it is the totality of the land which constitutes the hereditament in question, is rateable, but in each of those cases it is on the footing of its being occupation of land. Here we come to a case where the

light railway company have the exclusive right of occupation of the rails by means of the grooves that there are in those rails, and I cannot doubt myself but that the exclusive occupation of those rails in that manner is an occupation of land within the meaning of the words of s. 211 of the Public Health Act. I entirely agree with the observations made by A. T. Lawrence J. when dealing with the question whether the land, which in this case means the rails, is used exclusively as a railway. He says: "When you look at the property specified in the rate-book it is described as lines of rails. Are they property which is used only as a railway? I think they are. It is quite true that persons pass over them in the exercise of their rights of passage over the highway, but that does not prevent their being used only in their character of railways by the company. It is that exclusive right of user which the company possess that makes them rateable at all. It seems to me impossible to say that they have an exclusive right to use the rails as a railway which makes them rateable and at the same time to say that they are not the only persons who use the rateable hereditament." The length to which this principle of exclusive user constituting occupation of land has been carried is illustrated by the case of *Paris and New York Telegraph Co.* v. *Penzance Union* (1), in which it was held by all the judges, although Lord Coleridge C.J. differed upon another point, that the exclusive occupation of the wires which were within the parish might constitute occupation of a rateable hereditament. Having said that, I should like to say generally with regard to this case that the argument which was based upon some analogy between tramways falling within the Tramways Act, 1870, and this light railway seems to me entirely untenable. All the matters which are relevant to this particular case have been dealt with so clearly by the Master of the Rolls that it is not necessary for me to add anything further. I agree that this appeal should be dismissed.

Buckley L.J. The question for decision is whether this light railway company are occupiers of land used only as a railway constructed under the powers of an Act of Parliament for public

(1) (1884) 12 Q. B. D. 552.

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conveyance. Taking the last words first, no question arises upon the words "for public conveyance." It is for public conveyance. Next, is this undertaking (using purposely that word and not the word "railway" for the moment) constructed under the powers of an Act of Parliament? In my opinion it is. It is constructed under the Light Railways Act, 1896, and the Light Railways Order made under that Act. Upon that the decision in *Elve* v. *Boyton* (1) is, I think, directly in point. Next, is what I have so far called the undertaking a railway? First, negatively I think that it is not a tramway. Many differences could be pointed out between the Tramways Act and the Light Railways Act which discriminate the one undertaking from the other, however much they may physically resemble each other. It is sufficient to point to such considerations as the following:— That the Light Railways Act tends as matter of policy to encourage railways which will assist agriculture or industries in different parts of the kingdom, and contains sections under which the Treasury may subsidize undertakings of that description. There is nothing, of course, of that kind in the Tramways Act. That the Light Railways Act does not confer on the local authority, as does the Tramways Act, the right to purchase the undertaking after a certain time; and there are certain other differences on which I need not dwell. A light railway is in its statutory origin a different thing from a tramway. Then if this undertaking is negatively not a tramway, is it affirmatively a railway? It seems to me that it is. The Act of 1896 repeatedly calls it a railway, adding, no doubt, the explanation that it is what is called a light railway, and in the very section, s. 12, to which so much attention has been drawn, the Act, in applying certain Acts of Parliament to this undertaking, says that they shall apply to a light railway in like manner as they apply to "any other railway." The thing is therefore a railway although it is that which by way of description the Legislature has called a light railway.

There remains, however, that which, to my mind, is the most formidable difficulty in this case, namely, the question whether the railway company are occupiers of land used only as a railway constructed under the powers of an Act of Parliament for public

(1) [1891] 1 Ch. 501.

conveyance? Upon that Mr. Lush advanced the proposition, which at first sight seemed to me right, that exclusive user as a railway is an expression which, so far as the metals are concerned, is a truism. The metals can only be used as a railway. You cannot do anything else with them, and, therefore, in this sense user only as a railway cannot mean user by the railway company exclusive of user by others, as for instance user of the surface as a highway. I have been convinced by an argument which Mr. Ryde has addressed to us that that view is wrong. It appears to me that Mr. Ryde must succeed if he can establish either one of two propositions: either that the word "land" in this sub-section means that right in the land which the rated occupier has, or that "user" means user by the occupier. I start with the fact that the case of the *Pimlico, Peckham and Greenwich Tramway Co.* v. *Greenwich* (1) laid this down, that a tramway company, or light railway company, in respect of their occupation are occupiers of a portion of the soil, that it is because they are occupiers of land that they are liable to a rate, and that the road as a tramway is in their exclusive use. So far, therefore, the light railway company are in occupation, and are in exclusive occupation as regards the railway. But that leaves open this question, Does that make this "land used only as a railway" when the land as distinguished from the metals is not in the exclusive use and occupation of the tramway company? I have been convinced by the argument that that matter is properly approached from the point of view, that s. 211 of the Public Health Act, 1875, is a section which by sub-s. 1 renders certain persons liable, and by clause (*b*) of the same sub-section gives particular persons the benefit of an exemption, and that, therefore, I am entitled, as matter of construction, in reading the operative part, to introduce, in place of general words, the particular words which describe the persons whose case I have under consideration. Reading it thus, the section will run, "General district rates shall be made and levied on the occupier of land used only as a railway constructed under the powers of an Act of Parliament for public conveyance and shall be assessed on the full net annual value of such property," adding by clause (*b*)

(1) L. R. 9 Q. B. 9.

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that he is only to pay one-fourth. In that connection the full net annual value of the property is the full net annual value of the land used only as a railway constructed. That is to say, the words are words which measure the occupier's right in respect of the land, and not everybody's right in respect of the land. The result, therefore, so far is this, that land when you come to the exemption clause must mean, not the land including the surface over which the public have a right of passage, but that particular portion of the land which the railway company have a right to occupy with the metals in that particular form so as to give them the exclusive use of the soil for their purposes. The same result may be arrived at if you read clause (*b*) as if it were "the occupier of any land used *by the occupier* only as a railway constructed under the powers of any Act of Parliament." Of course that is adding words to the clause, but does it mean that? I am satisfied that it does, otherwise the rating would be on one footing and the words of exemption would be on another. Whether this result is one which could have been intended by the Legislature when the Act was drawn I do not know. If, as the local authority contended, we are to enter into a consideration of the question whether the railway company enjoy the full benefit of the rates in respect of their occupation of this land—if the principle, in short, of the case of the *South Wales Ry. Co.* v. *Swansea Local Board* (1) is to be applied—it appears to me that they do, but I do not think that that would be a sound ground on which to rest a judgment. The question to determine is not what benefit they get from the rates, but whether or not they are within the language of the exemption in the Act of Parliament which says that under certain circumstances they are only to pay one-fourth of what everybody else pays. As matter of construction I have come to the conclusion that they are within the exemption, and, consequently, this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Parker, Pritchards, Barham & Lawford, for Greenhalgh, Town Clerk, Wakefield; Ashurst, Morris, Crisp & Co.*

(1) 4 E. & B. 189.

H. B. H.

AIREY, Appellant *v.* SMITH, Respondent. 1907

April 15.

Local Government—Information—Execution of Work in Contravention of By-law—Continuing Offence—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 158.

Where an information charged the appellant with executing certain work in contravention of the by-laws of a local authority, and it was proved that he was responsible for the continued existence of the work after receiving notice that it was in contravention of the by-laws:—

Held, that he might be convicted on this information by virtue of s. 158 of the Public Health Act, 1875, of a continuing offence as well as of the offence specifically charged.

Case stated by the stipendiary magistrate for the city of Birmingham.

The respondent, the Town Clerk of Birmingham, laid an information against the appellant, who was a builder, which was in the following terms: "For that he (the appellant) between August 1, 1906, and the date thereof (September 25, 1906) at the city aforesaid, did in a certain new street under construction by him leading out of Warr Lane Harborne in the said city carry out certain works for the drainage of such new street and of the adjoining properties on the west side thereof otherwise than in accordance with the specification of the city surveyor, the said specification providing that the whole of the front roof water from the houses in such new street, was to be taken into the surface water sewer in the said new street, each stack of down pipes to have separate connections, and he then and there draining such roof water into a drain in front of such houses other than the said sewer, contrary to by-law 4 (*e*) of the Building By-laws of the said city and contrary to the statute in such case made and provided."

By by-law 4 (*e*): "When the proposed level of any new street shall have been approved by the council, their surveyor shall specify the depth and inclination, form, size, materials, and other particulars of the sewers and their appurtenances according to which the works for the proper drainage of such street and of the adjoining properties shall be carried out; and no person shall carry out any works for the proper drainage of

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such street and of the adjoining properties otherwise than in accordance with such specification."

By by-law 111: "Every person who shall offend against any of the foregoing by-laws shall be liable for every such offence to a penalty of 5*l.*, and in the case of a continuing offence to a further penalty of 40*s.* for each day after written notice of the offence from the city council. . . . ."

At the hearing before the magistrate it was contended on behalf of the appellant (inter alia) that there was no continuing offence for which daily penalties could be inflicted, and that such penalties were not claimed in the information.

The respondent contended that there was a continuing offence during the time the works continued to be carried out or remained unabated.

The magistrate overruled the contentions of the appellant and found as a fact that the works were complete and in existence from August 17, 1906, and that they were not in accordance with the specification of the city surveyor, and that on August 17 a written notice of the offence from the city council had been given to the appellant. He therefore convicted the appellant and adjudged him to pay a penalty of 5*l.*, and a further penalty of 2*l.* for each day during which the offence continued from August 17 down to the date of the hearing, but stated this case for the opinion of the Court.

Maddocks, for the appellant. The magistrate was wrong. The appellant was not summoned for a continuing offence, and on this information there was no jurisdiction to impose a penalty for a continuing offence. *James* v. *Wyvill* (1) is explained by *Reay* v. *Mayor, &c., of Gateshead* (2), which follows *Marshall* v. *Smith.* (3) The offence of making the drain contrary to the specification of the city surveyor is quite a different offence to the continuing offence. It is not even evidence of it: *Pomeroy* v. *Malvern Urban District Council* (4); *Welsh & Son* v. *Mayor, &c., of West Ham.* (5) The conviction must follow the information:

(1) (1884) 51 L. T. 237.
(2) (1886) 55 L. T. 92.
(3) (1873) L. R. 8 C. P. 416.
(4) (1903) 89 L. T. 555.
(5) [1900] 1 Q. B. 324.

Kirkin v. *Jenkins* (1); and in order to convict of a continuing offence such an offence must be specifically charged in the information: *Ex parte Burnby*. (2) There is no power even to convict of an offence less than that charged in the information: *Martin* v. *Pridgeon* (3); *Reg.* v. *Brickhall*. (4) [He also referred to *Reg.* v. *D'Eyncourt* (5); *Hamilton* v. *Walker*. (6)]

Avory, K.C. (*McCardie* with him), for the respondent. The magistrate was right. It is unnecessary that the information should charge a continuing offence in terms. The offence which the appellant committed was a continuing offence. By s. 158 of the Public Health Act, 1875 (38 & 39 Vict. c. 55): "Where the beginning or the execution of the work is an offence in respect whereof the offender is liable in respect of any by-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the by-law shall be deemed to be a continuing offence."

Maddocks replied.

LORD ALVERSTONE C.J. I have come to the conclusion that the magistrate was right. If it could have been successfully maintained that the conviction was for two separate offences, it would have been wrong, because the only charge in the information is that the appellant carried out certain works otherwise than in accordance with the specification of the city surveyor contrary to by-law 4 (*e*), and contrary to the statute in such case made and provided. It seems to me impossible to maintain that the construction of the works and the keeping of them must be separate offences where in fact both acts are done by one person. It may be possible to shew that the person who constructed the works in any place is not liable for keeping them there, and it may be that there is some other person who has maintained the works so as to make himself liable to a penalty; but I do not think that it can be laid down, merely because there is a penalty for maintaining a structure which has been illegally constructed, that of necessity the keeping of it up

(1) (1863) 32 L. J. (M.C.) 140.
(2) [1901] 2 K. B. 458.
(3) (1859) 28 L. J. (M.C.) 179.
(4) (1864) 33 L. J. (M.C.) 156.
(5) (1888) 21 Q. B. D. 109.
(6) [1892] 2 Q. B. 25.

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is a separate offence. In my judgment the difficulty is met by s. 158 of the Public Health Act, 1875. Prior to that enactment the remedy of the local authority was to enter and to remove that of which they complained, and it seems to me that the Legislature in passing the Public Health Act of 1875 has dealt specifically with that matter. And how did it deal with it? It said: "Where an urban authority may under this section pull down or remove any work begun or executed in contravention of any by-law, or where the beginning or the execution of the work is an offence in respect whereof the offender is liable in respect of any by-law to a penalty, the existence of the work during its continuance in such a form and state as to be in contravention of the by-law shall be deemed to be a continuing offence, but a penalty shall not be incurred in respect thereof after the expiration of one year from the day when the offence was committed or the by-law was broken."

Now it seems to me that that means that when the magistrate finds that the work is in existence, and has been continued in a state contrary to that which the by-law provided, it shall be deemed to be a continuing offence. Therefore, in my judgment, it cannot be maintained after that section that it was an improper thing to deal in the same proceedings, and under the same information, with the original construction of the work and the maintaining of it in the same condition, although it may, as I have already said, be quite possible that the person charged might not be liable both for the original construction of the work and for keeping it there. Therefore, upon the point that we ought to deal with the maintaining of the work and the construction of it as being two separate offences, and that they could not be put into the same conviction, I am clearly of opinion that the contention for the appellant was wrong. I think that the case of *James* v. *Wyvill* (1) shews that that is the true view, the language of the by-law in that case being in effect the same as that of s. 158.

The other point is as to whether or not the summons and information in this case was sufficient to give the appellant

(1) 51 L. T. 237.

notice that he was charged also with a continuing offence. A notice had been given to him upon August 17 alleging that he had been sending down surface water and discharging, not into a sewer as specified, but in some other way, and it contained the words "for such offence you are liable to penalties of 5*l.* and 40*s.* for every day during which the offence continues." Therefore, from the point of view of giving the man notice of the consequences of his act, that notice was sufficient. The information alleged that the appellant did carry out certain works in an unauthorized way and contrary to the by-laws. Before the magistrate no point was taken that the appellant was not responsible for the continuance of the works in existence after August 17. On the contrary, it was frankly admitted that he was the builder who was laying out the street, and that he desired to raise the question of the right of the corporation to enforce upon him the double system of drainage. I think under those circumstances the proceedings were properly instituted, and that the magistrate could under s. 158, against a person who was in fact responsible for the continuance, treat the offence as a continuing offence and inflict the additional penalty on him. In other words, it was in the power of the magistrate, finding that the man who was responsible for the construction of the work had kept it in the same condition, to treat the case as not a single act, but a continuing offence, and therefore to inflict greater punishment.

I am therefore of opinion that the magistrate has not exceeded his jurisdiction, and that the appeal must be dismissed.

DARLING J. I am of the same opinion for the same reasons.

PHILLIMORE J. I agree.

Appeal dismissed.

Solicitor for appellant: *Edward F. Freeland, Birmingham.*

Solicitors for respondent: *Sharpe, Parker & Co., for E. Orford Smith, Birmingham.*

A. P. P. K.

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April 15, 16.

GOODWIN, Appellant *v.* SALE, Respondent.

Local Government — Slaughterhouse — Licence — Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *s.* 126.

A licence for the use and occupation of a place as a slaughterhouse granted under s. 126 of the Towns Police Clauses Act, 1847, is a personal licence, and expires at the death of the licensee, and does not enure for the benefit of subsequent occupiers of the place.

Case stated by justices.

On October 11, 1906, the appellant, who was a butcher, was convicted on an information charging "that he on September 24, 1906, at premises in Westbury Street in the borough of Leominster, unlawfully did use a certain building as a slaughterhouse without having first obtained a licence from the corporation of Leominster (being the urban sanitary authority for the district) authorising him to use the said building as a slaughterhouse, the said building not then being a place which had been used and occupied as a slaughterhouse at the time of and continuously since the passing of the Public Health Act, 1875, contrary to the provisions of the Towns Improvement Clauses Act, 1847, and the Public Health Act, 1875." It appeared that under s. 12 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), that Act was adopted by the borough of Leominster in 1865, and therefore became the "special Act" referred to in s. 126 of the Towns Improvement Clauses Act, 1847, so far as regarded the urban sanitary district of the borough.

On April 7, 1874, the town council, as urban sanitary authority for the borough, granted to one Henry Smith, a butcher, a licence to slaughter animals on the premises in question, and those premises were then duly registered as a slaughterhouse in the books of the corporation.

Smith continued to use the slaughterhouse until his death on May 26, 1881.

The slaughterhouse then became the property of his widow, who continued to carry on the business and to use the premises as a slaughterhouse till 1898. From 1898 to June 24, 1906, there was no continuous user of the premises as a slaughterhouse,

but on that date the premises were let to the appellant, who in the course of his business used the building as a slaughter-house.

It was contended on behalf of the appellant that s. 126 of the Towns Improvement Clauses Act, 1847, contemplated two classes of slaughterhouses, namely, those in use at the time of the adoption of the special Act which are required to be registered, and new slaughterhouses created by licences granted since the adoption of the special Act, and that, while in the first class continuous user as a slaughterhouse was necessary in order that the premises should continue to be used as a slaughterhouse, no such continuous user was necessary in the case of premises licensed as a slaughterhouse after the adoption of the special Act, but that such licence was a licence granted to the premises, and was not a personal licence, but enured for the benefit of successive occupiers of the premises. The justices were of opinion that the licence granted to Henry Smith was a personal licence, which expired at his death. They therefore convicted the appellant, but stated this case for the opinion of the Court. (1)

Bailhache, for the appellant. The justices were wrong. The Towns Improvement Clauses Act, 1847, clearly distinguishes two

(1) By the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), s. 2, "the expression 'the special Act' used in this Act shall be construed to mean any Act which shall be hereafter passed for the improvement or regulation of any town . . . . and with which this Act shall be incorporated. . . . ."

By s. 126 "no place shall be used or occupied as a slaughterhouse . . . . which was not in such use and occupation at the time of the passing of the special Act, and has so continued ever since, unless and until a licence for the erection thereof or for the use and occupation thereof as a slaughterhouse . . . . have been obtained from the Commissioners; and every person who, without having first obtained such licence as aforesaid, uses as a slaughterhouse . . . . any place . . . . not used as such at the passing of the special Act, and so continued to be used ever since, shall for each offence be liable to a penalty. . . . ."

The Public Health Act, 1875 (38 & 39 Vict. c. 55), repealed the Local Government Act, 1858, and by s. 169 provided that, "for the purpose of enabling any urban authority to regulate slaughterhouses within their district, the provisions of the Towns Improvement Clauses Act, 1847, with respect to slaughterhouses, shall be incorporated with this Act."

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classes of slaughterhouses, namely, those in existence before the passing of the special Act, for which continuous user was necessary, and those licensed under the Act. Nothing is said about the licence being granted to any particular person. It is a licence for the erection or for the use or occupation of premises as a slaughterhouse, and it enures for the benefit of all occupiers of those premises. Sect. 29 of the Public Health Act of 1890 for the first time gave the local authority power to grant slaughterhouse licences for a fixed period, and s. 30 of that Act requires that notice of any change in the occupation of premises licensed as a slaughterhouse is to be given to the inspector of nuisances, thus recognising that until then the licence of a slaughterhouse was a licence granted to the premises, and not a personal licence.

J. B. Matthews, for the respondent. The magistrates were right. It is impossible that the Legislature can have intended a slaughterhouse licence to last for all time. Such a construction would lead to absurdity. The licence must be granted to some person, and must be a personal licence, which expires with the death of that person. A licence granted to a place is unknown to the law.

Bailhache replied.

DARLING J. I think that this appeal must be dismissed. It appears that this place had formerly been used as a slaughterhouse under a licence which was granted on April 7, 1874, to one Henry Smith. Henry Smith carried on the business of a butcher there until his death on May 26, 1881, and after that his wife carried on the business and occasionally, no doubt, had an animal slaughtered in that place. The appellant had nothing to do with the matter until these premises were let to him as tenant on June 24, 1906; he has obtained no licence on his own account to slaughter animals at that place. He contends that because Henry Smith obtained in 1874 a licence to slaughter animals there, anybody who may come into possession of those premises at any time thereafter is entitled, without any further licence, to slaughter animals there. I think that is unfounded. Sect. 126 of the Towns Improvement Clauses Act,

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1847, which is the Act applicable to this case, recognises, I think, two classes of slaughterhouses: those which existed before the Act was applied to any borough, with regard to which it was provided that they should continue to exist as slaughterhouses so long as they were continuously used; and those which became slaughterhouses because they were licensed as slaughterhouses under the Act. This place belongs to the latter class; it is not one of the old slaughterhouses, and I do not think therefore that the question of continuous usage as a slaughterhouse applies. The contention for the appellant is that whereas the old slaughterhouses lost their rights if they were not continuously used, this one, having received a licence in 1874, would never require a licence again, but was so thoroughly and indelibly impressed with the character of a slaughterhouse that anyone who should be in possession of that place at any time would be licensed to slaughter animals. That involves the absurdity that every place licensed to anybody to slaughter cattle after 1847 would become a slaughterhouse for all time, unless it was a slaughterhouse licensed for a limited period under the provisions of the Public Health Act, 1890. I cannot myself think that the Act of 1890 applies to this matter. My view is that on Henry Smith's death the licence granted died with him, and that if anyone should desire to slaughter animals again in that place, a new licence would have to be obtained. I think, therefore, that these premises after Henry Smith's death in 1881 were no more licensed for the slaughter of cattle than any house that never had been inhabited at all by a man with a licence.

PHILLIMORE J. I am of the same opinion. We are not here dealing with the old slaughterhouses in respect of which vested rights attach, and we have not therefore to deal with the question of continuous user. What we have to say is, What was the effect of a licence granted in 1874? It was granted under the provisions of the Towns Improvement Clauses Act, 1847. There are, no doubt, expressions in s. 126 of that Act which point to a licensing of the place. I, however, agree with Mr. Matthews that as far as one can recollect there are no other instances in law known in which places are licensed; I, at any rate, have not been able

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to think of any. Persons may be licensed, and they may be licensed to act only in particular places. I come to the conclusion, therefore, that these sections enable the authority of the town to license a person to slaughter in a place, that that person cannot slaughter elsewhere, and that nobody but the person and his servants can slaughter there. I am assisted to that conclusion by the language of ss. 129 and 130 of the Towns Improvement Clauses Act, 1847. I have read and re-read s. 129, and it seems to me clearly to contemplate there may be two or more licensees in one licensed place. If the argument for the appellant is right, that would be quite unnecessary. The place would be licensed in the name of one man, and then anybody either contemporaneously or subsequently could slaughter there. Upon the ground of the construction of the language of ss. 129 and 130, supported by the general principle of law with respect to licences, I come to the conclusion that this was a licence to an individual to slaughter in a particular place, and that both conditions were necessary, that there should be the individual and that there should be a particular place. A point is made upon ss. 29 and 30 of the Public Health Act, 1890. No doubt s. 30 of that Act does afford an argument. It may be that the effect of the Act of 1890 is to create places which are licensed, and in regard to licences granted since the Act of 1890 it may be that they may operate to license a place and not merely a person in a place. It is not necessary to decide that, and I do not decide it. All I say is that such difficulties as arise under s. 30 of the Act of 1890 do not seem to me strong enough to lead me to place a different construction upon the Act of 1847. It is familiar to us all that vested interests very easily grow up, and that places in which people are entitled to do certain things very often get a position of their own in public estimation, quite apart from the position of the people who are entitled to do things in them, and it may be that the Legislature is adopting popular language when it expresses itself as it does in s. 30 of the statute of 1890. However that may be, I think in this case that we have only to consider the Act of 1847, and I agree with my brother that this was only a licence to Henry Smith to slaughter in this particular place, and that, although the place remains, the man being gone,

the licence has dropped, and therefore that this conviction was right.

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Appeal dismissed.

Solicitors for appellant: *Gerald & Arthur Marshall, for H. J. Southall, Leominster.*

Solicitors for respondent: *Andrews, Fawcus & Ogilvie, for W. T. Sale, Leominster.*

A. P. P. K.

LEYTON URBAN DISTRICT COUNCIL *v.* CHEW.

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April 29.

Local Government—Construction of New Streets—Channelling—By-laws—Validity of—Reasonableness—Uncertainty.

A by-law of a local authority dealing with the construction of new streets provided that in all cases where the street was of a certain width the person constructing it should make on each side of it "a proper channel not less than twelve inches wide and six inches deep either of granite cubes laid on a bed of cement concrete at least six inches in thickness or otherwise in a suitable manner and with suitable materials':—

Held—(1.) that the fact that the by-law did not give any power to the person constructing the street to object before some independent tribunal that the requirement was unnecessary in the circumstances of the particular case did not make the by-law bad as being unreasonable; (2.) that the liberty of making the channel in another manner, and of other materials than those specified, did not make the by-law bad for uncertainty.

CASE stated by justices of Essex.

The respondents were summoned to answer two informations laid by the appellants charging that they between April 30 and October 10, 1906, in the parish of Leyton, did unlawfully construct two streets without having constructed on each side of such streets proper channels as required by the by-laws of the appellants.

At the hearing of the informations the following facts were admitted or proved:—

The appellants, purporting to act in pursuance of the powers conferred by s. 157 of the Public Health Act, 1875, on January 31,

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1905, made certain by-laws with respect (inter alia) to new streets and buildings, which by-laws were duly confirmed by the Local Government Board on April 3, 1905.

By-law 8 of the said by-laws provides (inter alia) as follows: "Every person who shall construct for use as a carriage road a new street intended to form the principal approach or means of access to any building shall comply with the following requirements; . . . .

"(*f*) He shall in all cases where the width of such street is forty feet or over forty feet construct the carriage way of six-inch hard core and six inches of ballast or macadam properly broken or otherwise in a suitable manner and with suitable materials, and shall construct on each side of such street a proper channel not less than twelve inches wide and six inches deep either of granite cubes laid on a bed of cement concrete at least six inches in thickness or otherwise in a suitable manner and with suitable materials."

The respondents, who were the owners of a certain building estate within the district of the appellants, in or about the month of May, 1906, formed on the said estate two new streets respectively called Canterbury Road and Chesterfield Road, which streets were intended to be used as carriage roads and to form the principal approaches or means of access to buildings, and were over forty feet in width.

The respondents constructed the carriage ways of the two streets of the materials and in the manner required by by-law 8, and they also placed kerbs at the outer edges of the footways on each side of the streets. The carriage ways, having a curved surface, formed at the point of junction with the kerb a conduit, but the respondents did not make any channels with granite cubes or cement concrete, and, save as herein mentioned, they did not construct any channels on the sides of the streets. On a portion of the land fronting on both the said streets, having in each case a frontage of 172 feet, there are at present no houses or other buildings except a church in course of construction.

The justices held that the requirement of by-law 8, sub-s. (*f*), with respect to channelling was invalid as being inconsistent with the provisions of the Public Health Act, 1875, and of the

Private Street Works Act, 1892 (1), and also that it was bad for uncertainty by reason of its containing the words "or otherwise in a suitable manner and with suitable materials." They accordingly dismissed the informations subject to a case for the opinion of the Court.

C. A. Russell, K.C., and *Courthope Munroe*, for the appellants. The supposed inconsistency between by-law 8 and the Public Health Act and Private Street Works Act, upon which the justices relied, consisted in the fact that those Acts, when empowering the local authority to require the frontagers in a street to pay for the channelling of it, give the frontagers a right of appeal against the requirement, whereas the by-law lays down a hard-and-fast rule without any right of appeal. But there is no inconsistency in that respect, the circumstances under which the frontagers and the person laying out the street are respectively called upon to pay for the cost of channelling being wholly different. It may be reasonable enough that the frontagers should have a right of appeal against a proposal to make up the street, but the conditions upon which a builder may obtain permission to lay out a street are quite another thing. There is nothing unreasonable in saying that if a person wishes to construct a new street he must do it in a particular way. Nor is there any substance in the objection that the by-law is uncertain. The person laying out the street cannot be heard to object to the presence in the by-law of an alternative requirement which was inserted for his protection.

Macmorran, K.C., and *Naldrett*, for the respondents. The

(1) By s. 268 of the Public Health Act, 1875: "Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them"—which includes a demand of payment of the expenses of making up a street under s. 150—"he may address a memorial to the Local Government Board stating the grounds of his complaint."

By the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 6, the urban authority may pass a resolution for the making up of a private street, the expense of which work is to be charged on the frontagers, and the authority are to serve on the frontagers notice of the nature of the works proposed. By s. 7 the frontagers may raise objections to the proposed works, which objections are by s. 8 to be determined by a Court of summary jurisdiction.

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by-law is inconsistent with the Acts mentioned. This is a street not repairable by the inhabitants at large, and the time will come when the respondents, as owners of the land fronting on it, may be required to make it up. They would then be allowed to contest the reasonableness of the work proposed. And it is unreasonable by means of a by-law to insist upon a man doing certain work at all events, the necessity of which he might successfully dispute if the time for doing it were delayed till after the houses forming the street had been built. The by-law is also unreasonable in that it requires the channelling to be done at the time of constructing the street. There are no houses in it yet, and if the channelling required by the by-law were done now it would have to be torn up in order to connect the houses when built with the sewer, or at all events the channelling would be destroyed by the cartage of the building materials, and the work would have to be done again. In *Rudland* v. *Sunderland Corporation* (1) a by-law was held to be unreasonable and bad which required the party constructing a new street to kerb the footpaths before any buildings were commenced. Here the appellants are seeking to require the street to be made up prematurely. Further, the by-law is bad for uncertainty. The respondents are entitled to know what it is that they are required to do. But the words "or otherwise in a suitable manner and with suitable materials" leave the nature of the work required entirely at large.

LORD ALVERSTONE C.J. The first point upon which the justices decided against the appellants in this case was that by-law 8, sub-s. (*f*), was bad as being inconsistent either with s. 268 of the Public Health Act, 1875, which gives a general power of appeal to the Local Government Board against any decision of the local authority with respect (inter alia) to the channelling of a new street under s. 150 of that Act, or with ss. 7 and 8 of the Private Street Works Act, 1892, which give a similar right of appeal from the local authority to a Court of summary jurisdiction. In my opinion that view is erroneous. It overlooks the fact

(1) (1884) 52 L. T. 617.

that the liability which those sections impose upon a certain class of persons, namely, the frontagers in a street, is a distinct liability from that which the by-laws under which the respondents were summoned impose upon the person constructing a new street. Sect. 150 of the Act of 1875 gave the urban authority power, where a street was not sufficiently sewered, levelled, paved, metalled, flagged, and channelled to their satisfaction, to require it to be made up at the expense of the frontagers, and under s. 268 the frontagers had a right of appeal against the demand of payment after the work had been done. The Private Street Works Act, 1892, in cases in which that Act is adopted, gives the urban authority power, "where any street is not sewered, levelled, paved, &c." (following the words of s. 150 of the former Act), to resolve to do the work themselves and charge the expense on the frontagers, and empowers the frontagers to object to the proposed works before they are executed, and to have their objections decided by the justices. And the Public Health Act by s. 157 also gives the urban authority power to make by-laws with respect (inter alia) to the level, width, and construction of new streets. The by-laws, therefore, and the above sections may to some extent cover the same subject-matter, but the liabilities which they create are wholly distinct. It cannot, in my opinion, be contended that because, in the event of the local authority not insisting upon the street being channelled until after all the houses had been built, the frontagers would have a right to object that the channelling proposed was unnecessary or unreasonably expensive, the builder, upon whom the obligation of making certain channelling is imposed as a condition of his being permitted to construct a new street, ought to have a similar right to object, and that a by-law which omits to give him that right is ultra vires. In the absence of a right of objection, the frontagers would be compelled to pay the expense of the work however extravagant it might be, but the act of the person constructing the street is a purely voluntary act. Therefore it is reasonable that there should be a right of objection in the one case and not in the other. At all events, there is nothing inconsistent in that state of things.

Then it was said that the by-law was uncertain by reason of

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Lord Alverstone C.J.

its containing the words "or otherwise in a suitable manner." But in my opinion that objection is equally bad. The by-law really only sets up a standard, and then gives a reasonable latitude in cases in which the standard is found to be more than is actually necessary. I quite agree that a man ought to know what he is required to do, but the answer is that the by-law gives him sufficient information. One must remember the varying conditions of different streets; what is necessary for one street is not necessary for another. Whether the particular manner of making the channelling, or the particular materials with which it is made, are suitable, is a question for the justices to decide. Lastly, it was contended that the time for making the channelling had not arrived, inasmuch as the houses intended to front on the streets were not yet built; and that if the channelling were made with concrete and granite at the time of constructing the roadway, when the houses came to be built the channelling would have to be taken up to allow of the waterpipes and drains of the houses being connected with the mains and sewers, and the work would have to be done all over again. It may be that that is so, and very possibly the justices may find that the respondents have every intention of eventually executing the channelling in strict conformity with the terms of the by-law. The appeal must be allowed, and the case must go back to be dealt with on the merits.

DARLING J. I am of the same opinion. I only desire to say that, as it is now settled that this Court will not hold by-laws made by local authorities to be unreasonable and invalid except in extreme cases, I think it follows that the tribunal which has to administer the by-laws, upon a complaint being made that they have been broken, ought to apply the same liberal construction to them in favour of the party complained against as this Court applies to them in favour of the local authorities. With regard to the particular by-law in this case, it is open to the respondents to contend that, though they have not laid down granite cubes on a concrete bed, they have nevertheless made a channel in a suitable manner and of suitable materials, having regard to all the circumstances of the case, the condition of the

street, and the requirements of the neighbourhood. And, further, they may contend that though they have not yet constructed a concrete and granite channelling, it being premature at present to do so, they have every intention of constructing it when the proper time for doing so arrives. Those are questions for the justices, and if they are able to convince the justices of those facts it would afford a good reason for not convicting them. The by-law is to be allowed to stand, although it is possible it may work hardship. But it must only be allowed to stand on the assumption that the justices who will administer it will see that the wide powers given to the local authority are not used in a manner which makes the administration of them oppressive.

PHILLIMORE J. I am of the same opinion. This by-law is attacked as being unreasonable and uncertain. It is a by-law which requires that a new street, the houses in which are intended for human habitation, shall at some time or other in the course of its construction have proper channels of a certain size made either of granite cubes on a concrete bed of a certain thickness or otherwise in a suitable manner and with suitable materials. How can that be unreasonable? If the requirement took the form of saying that no building operations should be carried on in the street until this channelling had been laid down there might be a good deal of force in the objection that the by-law was commercially unreasonable. That was, I take it, the ground upon which the case of *Rudland* v. *Sunderland Corporation* (1) was decided. There there was an express provision in the by-laws that no building should be commenced until the footpaths had been kerbed. There is no corresponding provision here. The by-law does not say at what time the channelling is to be laid down. The time may or may not have arrived. That is for the justices to decide, and we leave the matter to them. Then it is said that the by-law is uncertain. It sets up a standard, as my Lord has pointed out, and then provides that the work may be done in some other suitable manner or with other suitable materials. That is a relaxation of the standard in favour

(1) 52 L. T. 617.

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of the person constructing the street. It seems to me that without it the by-law might be commercially impracticable.

Judgment for the appellants.

Solicitors for appellants: *Vincent & Vincent.*

Solicitor for respondents: *C. R. Taylor.*

J. F. C.

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April 18.

BENNING AND OTHERS *v.* THE ILFORD GAS COMPANY.

Practice—Joinder of several Causes of Action—Payment of Lump Sum into Court—Rules of Supreme Court, Order XVI., r. 1—Order XXII., r. 2.

Order XXII., r. 2, of the Rules of the Supreme Court provides that payment into Court shall be signified in the defence, and that the claim or cause of action in satisfaction of which the payment is made shall be specified therein.

In an action constituted under Order XVI., r. 1, brought by a number of plaintiffs severally claiming relief in respect of the same transaction, the defendants paid a lump sum into Court, saying in their defence that the amount paid into Court was sufficient to satisfy the plaintiffs' claims, but without further specifying the claims or causes of action in satisfaction of which the payment was made:—

Held, that the payment into Court was a good payment, and that if the plaintiffs were embarrassed by it their proper course was to apply by summons for particulars of the payment.

APPEAL from an order of an official referee as to costs.

The action was brought under Order XVI., r. 1 (1), by twelve plaintiffs claiming relief severally in respect of or arising out of the same transaction.

The statement of claim alleged that the plaintiffs, other than the plaintiff Benning, were mortgagees and owners in possession respectively of certain leasehold messuages at Ilford, in the county of Essex—the plaintiff Halls being mortgagee and owner in possession of five messuages, the plaintiff Hunt of six messuages, the plaintiff Baskwill of four, the plaintiff Biggs of two, the plaintiff Kotze of five, the plaintiff Copp of three messuages, and

(1) Rules of Supreme Court, Order XVI., r. 1: "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise. . . . ."

the plaintiffs Tuson, King, Wyatt, Watson and Dunham of one messuage each. The plaintiff Benning was the owner of the equity of redemption of all the said messuages.

The statement of claim further alleged that the defendants were the owners of certain lands and hereditaments adjoining or near to the aforesaid messuages and premises; that in December, 1900, the defendants wrongfully obstructed a certain natural stream or watercourse running through their lands, and thereby caused to collect upon their lands a large quantity of water, which on June 15, 1903, they negligently allowed to flow on to the messuages and premises of the plaintiffs. The plaintiffs claimed 1115*l.* 15*s.* damages.

The defendants, among other defences, brought into Court with a denial of liability the sum of 100*l.*, saying that the same was sufficient to satisfy the plaintiffs' claims.

The defendants applied that the case should be heard before an official referee; on this application they withdrew their denial of liability, and an order was made that, the defendants admitting liability, the question of damage should be referred to an official referee, who should have all the powers of certifying and amending of a judge of the High Court, and should direct judgment to be entered pursuant to Order XXXVI.

The official referee found that the plaintiff Benning was not entitled to recover any damages against the defendants. To the other plaintiffs he awarded small sums varying from 1*l.* to 18*l.* 2*s.* 6*d.* and amounting in the aggregate to 79*l.* 10*s.*; and he found expressly that the amount paid into Court by the defendants was more than sufficient to satisfy the plaintiffs' claims.

The plaintiffs contended that they were entitled to all the costs of the issues on which they had succeeded, on the ground that the payment into Court was irregular and invalid in that the defendants had not specified in their defence the causes of action in satisfaction of which the payment was made, and had therefore failed to comply with the provisions of Order XXII., r. 2. (1)

(1) Order XXII., r. 2: "Payment into Court shall be signified in the defence, and the claim or cause of action in satisfaction of which such payment is made shall be specified therein."

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The official referee ordered that judgment should be entered for the defendants against the plaintiffs, with costs from and after the date of the payment into Court after deducting from those costs the plaintiffs' costs up to the date of payment into Court.

Judgment was entered accordingly.

The plaintiffs appealed from this judgment in so far as it related to the costs.

Leck (*Lincoln Reed* with him), for the appellants. The official referee has treated this payment as a good payment into Court under Order XXII., r. 1, and upon that basis he has made the order as to costs, allowing the respondents the costs from and after the date of that payment. He was wrong in treating it as a good and valid payment into Court. Order XXII., r. 2, makes it essential that the cause of action in respect of which the payment into Court is made should be specified in the defence. In this case there were twelve separate and distinct causes of action, and one lump sum was paid in generally, but whether in respect of all the causes of action, or some of them and not others, is not specified. If it was made in respect of some only, the appellants were entitled to know in respect of which the payment was made and how much was intended in respect of each: *James Tucker Steamship Co.* v. *Lamport & Holt.* (1)

[DARLING J. The plaintiffs in that case took out a summons for particulars. The appellants in this case might have done the same. The plea of payment into Court was prima facie good. Any inconvenience might have been cured by particulars: *Paraire* v. *Loibl.* (2)]

The plea cannot be good unless made in accordance with the rules; if the defendant puts upon the record a bad plea, the plaintiff is not bound to draw his attention to its defects. He may neglect it and treat it as if there were no plea. To say that, when Order XXII., r. 2, was made, the present scope of Order XVI., r. 1, was not contemplated is merely to give a good reason for amending Order XXII., r. 2. In a case of *Hellings and Wife* v. *West End Drapery Stores* (3), tried at Bodmin in June, 1899,

(1) (1906) 23 Times L. R. 10.
(2) (1880) 49 L. J. (C.P.) 481.
(3) Unreported; ex relatione S. J. Fraser Macleod, K.C.

before Phillimore J., an action was brought by the plaintiffs for personal injuries to the female plaintiff owing to the negligence of the defendants in allowing a bale of goods to fall upon her. She claimed damages for the personal injuries and pain and suffering, and the male plaintiff claimed for loss of consortium and for medical expenses. The defendants paid a lump sum of 100*l.* into Court. The jury found a verdict for 100*l.* The defendants contended that they were entitled to judgment, but Phillimore J. held that the plea of payment was bad, in that it did not purport to apportion the amount paid into Court between the plaintiffs, and he accordingly gave the plaintiffs the costs of the action. That ruling covers the present case.

[*Wagstaffe* v. *Bentley* (1) and *Powell* v. *Vickers, Sons & Maxim* (2) were also referred to.]

Sylvain Mayer and *R. Storry Deans*, for the respondents, were not called on.

DARLING J. This appeal fails. The action was brought by a mortgagor and owner of the equity of redemption and a number of mortgagees in possession for damage done to certain property by the alleged negligence and breach of statutory duty on the part of the defendants resulting in an injury or nuisance to the plaintiffs. The plaintiffs recovered in the aggregate a sum of 79*l.* 10*s.*, consisting of several small sums recovered by the various mortgagees varying from 18*l.* to 1*l.*, while the mortgagor recovered nothing. It is to be observed that if he had brought his action separately he would have had to pay all the costs of that proceeding, whereas by adopting the procedure now authorized by Order XVI., r. 1, he has only been ordered to pay costs since the date of the payment into Court by the defendants.

The case was heard before an official referee, and the appellants complain that he treated the payment into Court of 100*l.* by the defendants as more than enough to cover the 79*l.* 10*s.* aggregate damages recovered by the plaintiffs; that is to say, that he has treated this case as one in which there was a single plaintiff, and that he was wrong in so treating it, as the Rules of the Supreme Court do not permit of his doing so.

(1) [1902] 1 K. B. 124. (2) [1907] 1 K. B. 71.

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Darling J.

I do not propose to go through the authorities which have been cited. I think the remarks of Bramwell L.J. in *Paraire* v. *Loibl* (1) as to the injustice which it might work to a defendant, if he was in all cases compelled to specify how much he had paid into Court in respect of each item of claim, apply in principle to the present case. The plaintiffs brought this action in this form for their own convenience, and as far as the costs are concerned one of them has benefited by this procedure, as have probably his co-plaintiffs also, though to a less extent. The defendants have paid a lump sum into Court with a denial of liability, the denial being subsequently withdrawn when the case was sent to the official referee. The question is, Was that a good payment into Court? The official referee has treated it as a good payment, and has made his order as to costs upon that basis. I think the true view is that this is a good payment prima facie. No doubt it may in certain cases prove inconvenient and possibly embarrassing to the plaintiffs in an action constituted as this action is. But the real answer to that objection is that in cases where plaintiffs are embarrassed by such a proceeding they have their remedy in their own hands. If they are minded to take the money out of Court and cannot apportion it among themselves, they can apply to a Master in chambers for an order that the defendant shall apportion it, and if his distribution of the money is not a just distribution he may in a proper case be made to suffer. No such step was taken by the plaintiffs in the present case; they went to trial without any allocation of the money in Court being asked for. In my view they cannot now successfully urge that the payment was bad from the beginning. I think, therefore, that this appeal must be dismissed.

PHILLIMORE J. I am of the same opinion. I think the case of *Paraire* v. *Loibl* (1), decided on a rule in the same terms as the present Order XXII., r. 2, was rightly decided, and that a defendant sued by one plaintiff in respect of several causes of action may properly pay into Court one sum admitting liability for many causes of action. He would no doubt in a proper case be ordered to give particulars, while in other cases such an order

(1) 49 L. J. (C.P.) 481.

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Phillimore J.

might be refused. However, Order xxii., r. 2, does not govern this proceeding; indeed, there is no rule which does govern it, because Order xvi., r. 1, which allows a number of plaintiffs with several causes of action to join in one writ, only took its present extended form in October, 1896, while in the general body of the Rules of the Supreme Court, 1883, no alteration has been made consequential upon the amendment of Order xvi., r. 1. It is true that in a case of *Hellings and Wife* v. *West End Drapery Stores* (1), tried before me at Bodmin, an action brought by a husband and wife for personal injuries to the wife, where each plaintiff had a separate cause of action, the wife for the injury done to her and the husband for loss of consortium and for medical expenses, I held that a payment into Court of one sum generally in respect of both causes of action was not a good payment into Court. I so held because by Order xviii., r. 4, husband and wife are specially privileged to join in one action. Claims by or against husband and wife may be joined with claims by or against either of them separately. That is an old rule tracing its existence back, at any rate, as far as the Common Law Procedure Act, 1852: see Dicey on Parties to an Action, p. 391. I took the view that they were specially privileged to bring two actions on one writ, and that then Order xxii., r. 2, applied and made it necessary that the claim or cause of action in satisfaction of which the payment into Court was made should be specified in the defence. I see great difficulties in applying that ruling to a case under Order xvi., r. 1, and I have come to the conclusion that the better view is that the payment made in this action was a good payment into Court. It was open to the plaintiffs if they were embarrassed by it to apply for particulars; but they did not do this. It is true that they took objection to the form of the pleading before the official referee and complained that particulars ought to have been and had not been given; but that is not the way in which to raise the point. They ought to have applied to have the sum apportioned before proceeding with the reference. We cannot interfere at this stage. The payment into Court was a good payment; it was more than enough to cover the whole amount

(1) Unreported; see ante, p. 292.

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recovered by the plaintiffs; and the official referee was quite justified in treating it as a good payment, and in making the order as to costs upon that basis.

Appeal dismissed.

Solicitors for appellants: *Wetherfield, Son & Baines.*
Solicitors for respondents: *Tyler & Vaughan-Roderick.*

W. H. G.

1907
April 23.

PICKERING *v.* WILLOUGHBY.

Criminal Law—Summary Jurisdiction—"Complaint by or on behalf of Party aggrieved"—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 42.

By s. 42 of the Offences against the Person Act, 1861, where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence.

An assault having been committed upon a person who was so old and infirm, and so much under the control of the assailant, as to be unable to institute or authorize proceedings, an information was laid by a relative of the person assaulted in respect of the assault. Two justices of the peace heard the matter and convicted the offender:—

Held, that the matter had been duly brought before the justices, upon complaint on behalf of the party aggrieved, within the meaning of the above section, and that they had jurisdiction to hear and determine it.

Nicholson v. *Booth*, (1888) 16 Cox, C. C. 373; 57 L. J. (M.C.) 43, distinguished.

CASE stated by the justices of Kingston-upon-Hull.

An information was laid by Albert Digby Willoughby, the respondent, purporting to prosecute on behalf of Jane Gardam, for that Alice Pickering, the appellant, did on July 19, 1906, unlawfully assault and beat the said Jane Gardam.

The appellant was the niece and the respondent the great-nephew of Jane Gardam, who was a very old and infirm woman. In September, 1905, while residing in her own house in Hull, she had a seizure which incapacitated her from managing her own household affairs; she was found ill in her own house by a neighbour, who communicated with the appellant

and her husband, John Charles Pickering, and they removed her to their house, No. 21, Balfour Street; she remained there until the end of November, 1905, when the appellant and her husband and the said Jane Gardam all removed to Jane Gardam's house, No. 45, Trinity Street. While residing with the appellant she had four or five other seizures, three of which occurred in the month of June, 1906, and after those seizures, and in consequence of her defective eyesight—for she was nearly blind—she was unable to take care of herself, and was at times of weak mental capacity. She was unable to dress or wash herself, and it was necessary that she should have someone in attendance to look after her.

On July 19, 1906, the appellant assaulted Jane Gardam.

It was proved that Jane Gardam was not allowed to be out of doors without either the appellant or an attendant with her; and that she had no opportunity of laying an information voluntarily, and was not capable of doing so.

It was contended on behalf of the appellant that, inasmuch as Jane Gardam had not laid the information on which the proceedings were founded, and inasmuch as the same had been laid without the knowledge, consent, or authority of Jane Gardam, and seeing that she had not been called at the hearing in support of the case, there was no complaint by or on behalf of the party aggrieved within the meaning of s. 42 of the Offences against the Person Act, 1861 (1), and that consequently the justices had no jurisdiction to convict.

The case of *Nicholson* v. *Booth* (2) was cited in support of his contention.

The justices considered that the facts in that case were materially different from the facts before them, as in that case the party assaulted was a free agent and capable of laying an information for himself; but from the evidence before them the justices were satisfied that the person assaulted, although perhaps

(1) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 42: "Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence . . . ."

(2) 16 Cox, C. C. 373; 57 L. J. (M.C.) 43.

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not non compos mentis, was so feeble, old, and infirm as to be quite incapable by herself of instituting proceedings in respect of the assault which they were satisfied had been committed upon her; and, further, that she was not a free agent, but, on the contrary, was completely under the control of the person who had committed the assault. They therefore overruled the appellant's objection, and found as a fact that the alleged assault on Jane Gardam on July 19, 1906, by the appellant was fully proved, and convicted her and fined her 40*s.* and ordered her to pay the costs.

The appellant being dissatisfied with this decision, the justices stated a case in which the foregoing facts appeared.

The question for the opinion of the Court was whether the appellant was properly convicted.

R. D. Muir, for the appellant. The justices had no jurisdiction to hear this matter except upon complaint by or on behalf of the party aggrieved—that is to say, by or with the authority of the party aggrieved: *Reg.* v. *Deny* (1); *Nicholson* v. *Booth* (2); *Reg.* v. *Wicklow Justices.* (3) This complaint was not made by the person aggrieved or by her authority or consent. The proper procedure would have been by way of indictment: *Reg.* v. *Gaunt* (4); or by summons for an aggravated assault under s. 43 of the Act: *Crocker* v. *Raymond.* (5)

Gwyer (*Randolph* with him), for the respondent. In *Reg.* v. *Deny* (1) and *Nicholson* v. *Booth* (2) the person aggrieved was himself able to institute or authorize proceedings. In the present case it is otherwise. The justices have taken this distinction, and it is a sound distinction. Further, the ratio decidendi of those cases was that the criminal proceeding would have barred any civil remedy the person aggrieved might have; he might have been entitled to substantial damages, a right of which he ought not to be deprived except by his own authority. The person aggrieved in this case cannot take or authorize civil proceedings

(1) (1851) 2 L. M. & P. 230; 20 L. J. (M.C.) 189.
(2) 16 Cox, C. C. 373; 57 L. J. (M.C.) 43.
(3) (1892) 30 L. R. Ir. 633.
(4) (1895) 18 Cox, C. C. 210.
(5) (1886) 3 Times L. R. 181.

for the same reason which prevents her from taking or authorizing criminal proceedings.

R. D. Muir in reply.

LORD ALVERSTONE C.J. In this case we are asked to hold on the authority of *Nicholson* v. *Booth* (1) that this proceeding is null and void on the ground that the defendant, a relation of the person assaulted, had no right to institute it. Although no steps have been taken to put this aged and infirm person under legal control, it is clear that the justices thought she was in such a state that she could not take care of herself. In these circumstances it is said that, if an assault falling short of an aggravated assault under s. 43 of the Act has been committed, no proceedings can be taken under s. 42 of the Act where the circumstances are such that the person assaulted cannot bring them himself and cannot authorize anyone else to bring them on his behalf. In my opinion that is too narrow a view of s. 42. Where from age or other infirmity the person assaulted cannot take proceedings himself, and cannot authorize another to take proceedings on his behalf, a relative who prosecutes for the assault does so on behalf of the person assaulted. To hold this does not in any way impair the authority of *Nicholson* v. *Booth* (1), to the effect that where a person, quite competent himself to prosecute or to confer on another authority to take proceedings, declines to move in the matter, another person who takes it upon himself to prosecute does not do so on behalf of the person assaulted. The distinction between the two cases, that in the one case the person aggrieved was a free agent who might but did not authorize, and in the other an aged and infirm person who could not authorize proceedings, has been pointed out by the justices, and is in my opinion a valid distinction. I should be sorry to think the law capable of reaching the assailant of one who is able to protect himself, but incapable of reaching one who commits an assault upon a defenceless victim. I think we ought to hold that one who from motives of protection makes a complaint for an assault upon such a person makes that complaint on behalf of the person

(1) 16 Cox, C. C. 373; 57 L. J. (M.C.) 43.

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aggrieved within the meaning of s. 42. I think, therefore, that this appeal must be dismissed.

DARLING J. I am of the same opinion. There is no analogy between this case and the case cited to us of *Nicholson* v. *Booth* (1), where a person capable of conferring an authority had not given it. In the present case there is no reason to suppose that the person would not have given authority to prosecute if she could have done so. It was only because of mental and physical infirmity that she failed to confer the necessary authority. In these circumstances we must hold that the respondent laid this complaint on her behalf. To hold otherwise would lead to the result that, if a person is helpless and weak enough, anyone may assault him with impunity, and that the law will only protect those who are strong enough to protect themselves.

PHILLIMORE J. I am of the same opinion. I only wish to add that this case would not be one of absolute impunity, even if we should hold that proceedings could not be taken under s. 42. The case might be sent before a jury. But I see no reason why those means of bringing an offender to justice should not be available in a case like the present which are available in case of the slighter offence of assaulting a person who is able to defend himself.

Appeal dismissed.

Solicitors for appellant: *C. J. Smith & Hudson, for Payne & Payne, Hull.*

Solicitors for respondents: *Bell, Brodrick & Gray, for G. S. Jordeson, Hull.*

(1) 16 Cox, C. C. 373; 57 L. J. (M.C.) 43.

W. H. G.

COLE, Appellant; BROWN, Respondent.

1907
April 25.

Poor Law—Pauper Lunatic—Maintenance—Order against Husband—Liability of Son to contribute—Poor Relief Act, 1601 (43 *Eliz. c.* 2), *s.* 7—*Poor Law Amendment Act*, 1850 (13 *&* 14 *Vict. c.* 101), *s.* 5.

The fact that an order has been made against the husband of a pauper lunatic, under s. 5 of the Poor Law Amendment Act, 1850, to pay a weekly sum to the guardians towards the cost of the wife's maintenance in an asylum does not exempt the son of the pauper lunatic from liability under 43 Eliz. c. 2, s. 7, to contribute towards her maintenance.

Case stated by justices of Middlesex.

On November 26, 1906, the respondent appeared before the justices, sitting as a Court of summary jurisdiction, on a summons calling upon him to shew cause why an order should not be made upon him upon a complaint made by the appellant on behalf of the guardians of the poor of the Brentford Union, as relieving officer of the union, that on August 20, 1906, the mother of the respondent, a lunatic, became chargeable to the union, and that the respondent was of sufficient ability, wholly or in part, to relieve and maintain her.

The facts, proved or admitted, were as follows:—

Sarah Ann Brown, a lunatic, was on November 7, 1906, duly admitted to the Middlesex County Lunatic Asylum at Tooting, to which asylum she had been sent from the Brentford Union. She had since been maintained in the said asylum at a weekly cost of 12*s.* 3*d.* to the guardians of the poor of the union, and at the date of the summons she was chargeable to the union.

Sarah Ann Brown was the wife of Henry Brown, who was alive, and proceedings had been taken against him under 13 & 14 Vict. c. 101, s. 5, by the appellant on behalf of the guardians at the time the summons against the respondent was issued, in which proceedings the justices had made an order upon Henry Brown to pay to the guardians the sum of 2*s.* a week towards the cost of the maintenance of Sarah Ann Brown so long as she remained chargeable to the guardians.

Sarah Ann Brown had three sons living, of whom the respondent

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was one; and summonses similar to the aforesaid summons had been issued against each of the respondent's brothers.

The justices dismissed the summons against the respondent, and also dismissed the summons against each of his brothers, upon the following grounds, viz.:—

That the husband was the nearest relative to the lunatic, and being of sufficient ability to contribute towards the cost of the maintenance of his wife, was primarily liable to do so under the Poor Law Acts, and that the lunatic's sons were not therefore liable to so contribute while the husband was alive and of sufficient ability; that to enable the justices to make an order upon any of the sons of the lunatic it was necessary for the guardians to prove that her husband was dead, or that he could not be found, or that he was not of sufficient ability to contribute towards the cost of the maintenance of his wife; that by 13 & 14 Vict. c. 101, s. 5, special provision is made to enable the guardians to proceed against the husband of an insane married woman for her maintenance, and it must be assumed that 43 Eliz. c. 2, s. 6, is impliedly repealed by the later Act.

The question for the opinion of the Court was whether the justices were right in dismissing the summons against the respondent upon the aforesaid grounds or any of them. (1)

(1) By 43 Eliz. c. 2, s. 7: "The father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of a sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices . . . . shall be assessed; upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein."

The Poor Law Amendment Act, 1850 (13 & 14 Vict. c. 101), s. 5: "Where any married woman being lunatic shall be duly removed to any asylum . . . . any two justices having jurisdiction in the place wherein the husband of such lunatic shall dwell, upon application by or on behalf of the guardians of the union . . . . to which . . . . such lunatic shall be or become chargeable, may summon such husband to appear before them to shew cause why an order should not be made upon him to maintain or contribute towards the maintenance of his wife in such asylum . . . . and . . . . such justices may (if they think fit) make an order upon him to pay such sum, weekly or otherwise, for or towards the cost of the maintenance of such lunatic, as after consideration of all the circumstances of the case shall appear to them to be proper . . . ."

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Macmorran, K.C., and *A. A. Bethune*, for the appellant. The fact that by s. 5 of 13 & 14 Vict. c. 101 a statutory liability is imposed upon the husband of a lunatic to contribute to the cost of her maintenance does not relieve the relatives mentioned in the Statute of Elizabeth from their liability under that Act. [They referred to *Arrowsmith* v. *Dickenson* (1); *Reg.* v. *Joyce* (2); *Rex* v. *Cornish*.(3)]

Rowsell, for the respondent. There is no authority which decides that, where the husband of the pauper has sufficient ability to pay for his wife's maintenance, and has had an order made against him, further orders can be obtained against other relatives. The amount of the payment to be made by the husband was a matter in the discretion of the justices, and it must be assumed that they fixed such a sum as, in the circumstances of the case, they considered proper. It is also consistent with the facts stated in the case that the wife, though a pauper lunatic within s. 5 of 13 & 14 Vict. c. 101, is not a poor person within the Statute of Elizabeth, and that that Act therefore does not apply.

LORD ALVERSTONE C.J. I am of opinion that this appeal must be allowed. I express no opinion as to whether the respondent has any defence to this summons under the Statute of Elizabeth, for no question as to that is raised by the case.

The magistrates dismissed the summons on the ground that s. 5 of 13 & 14 Vict. c. 101, which makes a husband liable to contribute to the maintenance of his wife when she is a pauper lunatic, must be assumed to have repealed by implication the Statute of Elizabeth, under which a liability is imposed on the relatives of a pauper to contribute to his maintenance. I have always understood that the liability under that Act did not cease because the pauper was in a lunatic asylum, and I believe that there are authorities which decide that orders for contribution can be made even if the pauper is a lunatic and is in an asylum. I can see no reason why the parish should not obtain contribution in that case. At common law a husband was always liable to

(1) (1887) 20 Q. B. D. 252. (2) (1707) 16 Vin. Abr. 423.
(3) (1831) 2 B. & Ad. 498.

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maintain his wife, and s. 5 of 13 & 14 Vict. c. 101 only enabled a statutory order to be made against him; but the fact that an order has been made against the husband under that section cannot affect the liability of the other relatives under the Statute of Elizabeth, and does not prevent an order from being made against them.

If it is the fact that the husband is able to pay the whole cost of his wife's maintenance, and that the justices for some reason thought that a weekly payment of 2*s.* was sufficient, those facts ought to have been stated in the case, but on the case as it is stated I am unable to come to the conclusion that the justices thought that 2*s.* a week was sufficient to remunerate the guardians. The justices ought to have heard the case against the respondent on its merits, and the appeal must therefore be allowed.

DARLING J. I agree.

PHILLIMORE J. I agree. The finding of fact that, at the date of the summons, the woman was chargeable to the union satisfies me that the case comes within the Statute of Elizabeth. I only wish to add that there is nothing in the language of s. 5 of 13 & 14 Vict. c. 101 to confine it to lunatics who are paupers, and it may be that it applies to a lunatic who is not a pauper, in which case there might be good ground for a special claim on the husband.

Appeal allowed: case remitted to justices.

Solicitor for appellant: *S. Leonard Hunt.*

Solicitor for respondent: *G. Brodie Clark, Brentford.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A. 1907 *April* 27.

AGINCOURT STEAMSHIP COMPANY, LIMITED *v.* EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED.

Submarine Telegraphs Convention—Protection of Cables—Fouling of Cable by Anchor—Sacrifice of Anchor—Compensation—Measure of Damages—Submarine Telegraph Act, 1885 (48 & 49 *Vict.* c. 49), *Schedule, art. vii.*

The Submarine Telegraph Act, 1885, Schedule, art. vii., provides that shipowners who can prove that they have sacrificed (inter alia) an anchor in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable:—

Held, that the liability of the owner of the cable under this article was to make compensation for the sacrifice of the anchor, but not further to pay the damages resulting from such sacrifice.

Semble, the amount of compensation is not necessarily limited to the cost of replacing the material sacrificed, but depends on the circumstances of each case.

This was an appeal from a decision of Bray J.

The plaintiffs were the owners of the steamship *Agincourt*, and the defendants, the Eastern Extension, Australasia and China Telegraph Company, Limited, and the Great Northern Telegraph Company, Limited, were the owners of submarine telegraph cables portions of which were laid across the bed of the Yang-tsze-kiang river, in the neighbourhood of Woosung, China. On August 31, 1905, the *Agincourt*, in the course of a voyage from Shanghai to San Francisco, via Japan, while in charge of a licensed pilot, anchored in the river, and on the next morning, there being indications of an approaching typhoon, the anchor was weighed, and the vessel proceeded further up the river to a safer anchorage. The starboard anchor was first dropped, and in the night, owing to the increase in the wind, the port anchor was let go. At daylight on September 2 it was necessary for the safety of the vessel that the anchors should be got up. Accordingly the port anchor was weighed, but it was found to be foul of a telegraph cable. It was then let go and the starboard anchor hove up, when it also was found to be foul of a telegraph cable. With a view to the preservation of the defendants' telegraph cables from injury, in the event of their being fouled by

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the anchors of vessels, the defendants issued the following public notice, which was dated Shanghai, August 1, 1902: "The Great Northern Telegraph Company, Limited, of Copenhagen; the Eastern Extension, Australasia, and China Telegraph Company, Limited.—Important Notice to Owners, Captains, and Pilots of Steamers and Sailing Vessels.—The submarine telegraph companies in the Far East desire to draw attention to the fact that telegraph cables, when caught by ship's anchors, chains, &c., as frequently happens, are unfortunately often damaged or broken in the endeavour to free the said gear, the latter being at the same time often lost or destroyed. It is consequently in the interest of all concerned that in such cases the greatest care should be taken not in any way to forcibly strain the cable when hooked, but preferably to sacrifice anchors and other gear. The telegraph companies have therefore decided to compensate owners of vessels (excepting houseboats, launches, and similar small craft) for loss of material from the above causes by adhering, for the Far East, to the Submarine Telegraph Act of 1885, Schedule, art. vii." The notice then proceeded to set out the terms of art. vii. (1)

On the faith of this notice the captain sacrificed his anchors and chains and immediately returned to Shanghai, where he made a statement as required by art. vii., and the statement was duly communicated to the defendants. In consequence of the loss of her anchors the *Agincourt* was detained at Shanghai for eight days while arrangements were being made to recover the lost anchors or obtain substitutes. This action was brought by the shipowners against the defendants for compensation for the sacrifice

(1) Art. vii. of the schedule (the Submarine Telegraphs Convention) to the Submarine Telegraph Act, 1885, is as follows: "Owners of ships or vessels who can prove that they have sacrificed an anchor, a net, or other fishing gear in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable. In order to establish a claim to such compensation, a statement, supported by the evidence of the crew, should, whenever possible, be drawn up immediately after the occurrence; and the master must, within twenty-four hours after his return to, or next putting into port, make a declaration to the proper authorities. The latter shall communicate the information to the consular authorities of the country to which the owner of the cable belongs."

of the ship's materials. In addition to the cost of the materials the plaintiffs, by their particulars, claimed damages for (inter alia) the detention of the vessel at Shanghai, for the extra consumption of coal in steaming from the place of the accident to Shanghai and back, and for the expenses incurred to save cancelling date at Portland under a charterparty.

At the trial it was proved or admitted that one of the anchors had fouled a cable belonging to the first-named defendants, but the position of the other cable had not been ascertained. These defendants before the commencement of the action had supplied the ship with a new anchor, and they paid the sum of 85*l.* into Court as representing the value of the chain which had been lost.

Bray J. gave judgment upon the points of law involved in the action, and declared (inter alia)—(1.) that the captain had concluded a contract in the terms of the notice issued by the defendants; (4.) that by the terms of the notice each company was liable for its own cables only; and (5.) further, that the liability of each company under the terms of the notice was not only for the value of the anchor and chain, but also for the damages resulting from such sacrifice, and he adjourned the trial of the questions of fact.

The first-named defendants appealed from declarations (1.) and (5.), and by their notice of appeal they asked for a declaration in lieu of declaration (5.), assuming that they were liable under the notice of August 1, 1902, that their liability was limited to the replacement of the anchor and chain or payment of their value.

Upon the hearing of the appeal the appellants admitted their liability under the notice, and the only question argued was as to the measure of damages.

J. A. Hamilton, K.C., and *Bailhache* (with them *Wolfe Barry*), for the appellants. Upon the construction of art. vii. of the Schedule to the Submarine Telegraph Act, 1885, compensation is limited to the thing sacrificed, that is to say, in this case it is limited to the cost of replacing the anchor and chain at the port of replacement. It does not include damages resulting from

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the sacrifice. Art. ii. throws some light upon the construction of art. vii., and affords an answer to the objection that, unless art. vii. is to be read as including all the consequences of the sacrifice, the master would always break the cable in preference to sacrificing his anchors, because it makes it a punishable offence to injure a submarine cable except for the purpose of saving the ship after every precaution has been taken to avoid breaking the cable. Then, if art. vii. is to bear the more limited meaning, a fortiori that meaning must be given to the notice, which in terms limits the compensation to loss of material.

Atkin, K.C., and *Raeburn*, for the respondents.

[BUCKLEY L.J. I suggest that art. vii. means to provide for compensation for the sacrifice, and not compensation for the consequences of the sacrifice.]

The judge has neither included nor excluded the items of damages claimed, and he was right in saying that the compensation was not limited to the loss of the materials. The telegraph companies have made an offer, which was intended to be an effective offer, to induce shipowners not to cut their submarine cables, and unless the offer is effective the master would always prefer to run the risk of cutting the cable. To compensate the shipowner for the sacrifice means to make good to him the loss arising directly and necessarily from the sacrifice. Suppose a ship became unseaworthy owing to the sacrifice of her anchors and was forced to put back to replace them, the expenses of and incidental to the putting back would be included in the compensation.

[COZENS-HARDY M.R. I do not think that the compensation is necessarily limited to the loss of the materials.]

Again, suppose the owner of a fishing smack sacrificed his net when it was full of fish, compensation would not be limited to the cost of a new net, or even to the cost of a new net plus the value of the fish in it at the time, but the loss of the opportunity of catching any more fish on that venture ought to be taken into account. Compensation means putting a man in the same position as he would have been in if he had not made the sacrifice.

Hamilton, K.C., in reply, gave up the contention that the compensation was limited to the 85*l.* paid into Court as representing

the value of a new chain, but submitted that the appeal was still necessary, as the declaration of the learned judge would unduly extend the liability of submarine telegraph companies.

COZENS-HARDY M.R. The question raised by this appeal turns mainly upon the true construction and effect of art. vii. of the Schedule to the Submarine Telegraph Act, 1885, because of the reference to that article contained in a notice issued by the appellant company, which notice was accepted by the master of the ship under circumstances which resulted in a contract made by the appellants with the shipowner. But a contract to do what? The language of the article is, "Owners of ships or vessels who can prove that they have sacrificed an anchor, a net, or other fishing gear in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable." The learned judge in the Court below has in his fifth declaration held that the liability of the company under the terms of the notice is not only for the value of the anchor or chain sacrificed, but also for the damages resulting from such sacrifice. The appellants are not content with that, and they ask to substitute for that a declaration that their liability is limited to the replacement of the anchor and chain or payment of their value. With great respect to the learned judge, I think the language of his declaration is dangerously wide, and I also think that the language of the appellants' notice of appeal is wrong.

The facts may be very shortly stated. The vessel was coming down from Shanghai; a storm arose; she dragged her anchor; the anchor got caught in a cable, and the pilot told the captain that he had better not try to clear his anchor, as the telegraph companies had issued a notice, the terms of which were not actually shewn to the captain, but which he accepted on the statement of the pilot. That sufficed to create a contract between the parties. What happened was this: The ship left her anchor behind, buoyed, and went up to Shanghai. There the telegraph company presented the ship with a new anchor, which is conceded to be as good as the old one, and they have paid into Court the cost of a certain number of fathoms of anchor chain. Is that the full measure of the compensation which the company

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agreed to pay? I think it is not, or at least not necessarily. I think that the compensation may reasonably extend to the journey back to Shanghai, there being no suggestion that that was not a reasonable course for the captain to take under the circumstances, and, therefore, prima facie I think that the offer of the telegraph company was not sufficient. On the other hand, the language used in this declaration seems to me to open a very wide field of inquiry which might result in grievous injustice to the telegraph company. I think that the proper form of order is that suggested by Buckley L.J. The fifth declaration will be modified by making it run as follows: "Further, the liability of each company under the terms of the notice is to make compensation for the sacrifice of the anchor or chain sacrificed, but not further to pay the damages resulting from such sacrifice."

BUCKLEY L.J. By their notice of appeal the Eastern Extension Telegraph Company ask this Court to reverse the judge's first declaration, by which he found that there had been concluded a contract in the terms of the notice issued by the telegraph companies. That has not been pressed before us on the appeal, and we are asked to dispose of the appeal on the footing that there was concluded a contract in the terms of the notice. The question, then, is one of the construction of that notice, and the first step towards that is the construction of art. vii. of the Schedule to the Submarine Telegraph Act, 1885. Read shortly, that article runs thus: "Owners who can prove that they have sacrificed an anchor in order to avoid injuring a cable shall receive compensation." That, I think, means that owners who can prove that they have sacrificed an anchor shall receive compensation for that sacrifice. The notice runs in a form whose meaning I think is accurately reproduced by stating it thus: "The telegraph companies have decided to compensate owners of vessels (with certain exceptions) for loss of material from the above causes in the following way, namely, owners of ships or vessels who can prove that they have sacrificed an anchor, &c., in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable." That is effected in the notice by putting in

the words "by adhering to art. vii.," and then the material words of art. vii. are repeated as I have just read them. Reading the notice in the way I have suggested, it means that the shipowner is to be compensated for the sacrifice of the anchor, or for the loss of the anchor, or for the loss of material, whichever way you like to express it. What is the true measure of compensation for the sacrifice of the anchor is a question which we mean to leave open. In my opinion, to limit the compensation to the replacement of the anchor and chain or payment of their value is not necessarily wrong. It may be wrong; and under some circumstances it may be right. I agree with the Master of the Rolls that it is wrong to limit the compensation to that as a matter of principle. What is to be ascertained is the compensation for the sacrifice of the anchor. The exact form in which that should be expressed will be by altering declaration 5 of the judgment below in the manner stated by the Master of the Rolls. That will leave open the question what is the proper amount to be paid as representing compensation for the sacrifice of the anchor. Certainly, in my view, a large part of that which is claimed here by the points of claim is far outside anything of that kind, but I do not think we ought to do more than make the declaration as above stated. I think, therefore, that the declaration of the learned judge should be amended in the manner proposed.

KENNEDY L.J. I agree, and the judgments which have been already delivered substantially cover, in my view, all that is important to be said. I only wish to add two things. First of all, stress was laid by the defendants in the Court below upon the existence of the words in the notice which forms the contract, when accepted and acted upon by the captain of the ship, "for loss of material from the above causes." I think compensation for loss of material is really another way of stating that which is contained in art. vii. of the Schedule to the Submarine Telegraph Act, 1885, and nothing different. "For loss of material" means for losing your anchor, which is a sacrifice, if you do it intentionally, for the purpose of saving the cable. I think that nothing turns upon the use of the word "material," and that compensation for loss of material in this notice is not necessarily

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limited to the replacement of the thing lost, but comprises all that may be fairly included in the word "compensation," not merely for the thing, but for the act which has been done—the sacrifice which has been made. At the same time, it is to my mind quite clear that parts of the claim in the particulars prima facie, at any rate, are too remote and fall outside anything which can be properly called compensation. The only other observation I wish to make is upon a point made by Mr. Raeburn in his very clear and concise argument with reference to the loss by a fishing smack of its nets. My view upon that may be thus expressed. If the net was actually being used at the time of the sacrifice, I do not think that compensation is necessarily confined either to the cost of a subsequent equipment of the boat with a net or to the value of the fish which were actually at the moment within the folds of the net. It might in some circumstances fairly include the loss of that which the use of the net during that fishing time might have got for the fisherman. On the other hand, supposing, although the sacrifice was made, there was another fishing-boat there, and the fisherman of that boat said, "Here is a net for you in lieu of the one you have just lost," or supposing the man who had sacrificed the net had a spare one on board, in either of those cases it would be absurd to say that anything more was needed as compensation than the cost of a new net (with the value of the take, if any, in the net when sacrificed) when the vessel came into port. Each case must stand on its own merits. In my opinion the suggestion of my brother Buckley which the Court has adopted places a proper limitation upon the order in the Court below, and at the same time leaves open for future argument on the facts what compensation for sacrifice really includes in this particular case.

COZENS-HARDY M.R. There will be no costs of the appeal.

Order varied.

Solicitors: *Bischoff & Co.; W. A. Crump & Son.*

H. B. H.

PONTARDAWE RURAL DISTRICT COUNCIL ELECTION PETITION.

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May 13.

Election Petition — Ballot Papers — Position of Voter's Marks on Paper— Sufficiency of—Ballot Act, 1872 (35 & 36 *Vict. c.* 33), *Sched. II.*

A ballot paper is not rendered void under the Ballot Act, 1872, by reason of the voter placing his mark outside the ruled compartments on the paper, within which compartments it is intended that the voter's mark shall be placed, if the mark is in such a position opposite to the name of a candidate as to leave no doubt for whom the voter intended to vote.

Case stated by the Master in the Election Petitions Office. An election of councillors for the Alltygrug ward of the parish of Llanquicke, in the rural district of Pontardawe, was held on March 25, 1907.

At that election there were five councillors to be elected, and there were nine candidates. The result as declared by the returning officer shewed the respondent, T. A. Evans, to be fifth on the poll with 454 votes, and the petitioner, R. S. Hodgson, sixth with 417 votes.

On April 9, 1907, a petition was presented against the return of the respondent on the ground that he was not elected by a majority of lawful votes over those recorded for the petitioner. A recount was ordered, and upon the votes being recounted it appeared that there were 416 valid votes for the petitioner and 401 for the respondent. Certain other and doubtful ballot papers were reserved for the consideration of the Court, among which were three papers in which the marks made by the voters were outside the compartments or ruled spaces on the ballot papers. The marks, however, although outside the compartments, were placed directly opposite the names of certain of the candidates, so as to leave no doubt for whom the voters intended to vote. These papers purported to contain two votes for the petitioner and two for the respondent, and therefore did not affect the result of the election, but as the question of the validity of papers so marked was frequently arising, and it was desired to obtain the opinion of the Court upon it, it was included in the statement of the special case.

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Hugh Fraser, for the petitioner. By s. 28 of the Ballot Act, 1872, "The schedules to this Act, and the notes thereto, and directions therein, shall be construed and have effect as part of this Act." Sched. II. gives a form of ballot paper which, on the front, contains opposite the names of the candidates ruled spaces, in which it is intended that the voters shall place their marks shewing for whom they mean to vote; and the form of directions, which is placarded in the polling station, directs the voter to "place a cross on the right-hand side, opposite the name of each candidate for whom he votes, thus, X." The directions say nothing about his placing it inside the ruled space; it is enough if it is opposite the name of a candidate. This seems clear from r. 36 of Sched. I., which provides that "The returning officer shall indorse 'rejected' on any ballot paper which he may reject as invalid, and shall add to the indorsement 'rejection objected to' if an objection be in fact made by any agent to his decision. The returning officer shall report to the Clerk of the Crown in Chancery the number of ballot papers rejected and not counted by him under the several heads of—(1.) Want of official mark; (2.) Voting for more candidates than entitled to; (3.) Writing or mark by which voter could be identified; (4.) Unmarked or void for uncertainty." That is intended to be an exhaustive list of the grounds upon which a ballot paper can be rejected, and in that list the placing of the voter's mark outside the ruled space is not included. Here there was no uncertainty about the papers, for the marks were directly opposite the names of the candidates.

No counsel appeared for the respondent.

RIDLEY J. Though it is not necessary to decide the point, as our opinion is invited, we are willing to give it. I think that as long as the mark is opposite the name of the candidate, so as to make it clear that the voter intended to vote for him, the vote is good. If the mark were above or below the name it would not be clear, and the paper would be void for uncertainty.

PHILLIMORE J. I agree. The effect of placing the mark outside the printed space may be to make it more difficult to decide for

whom the vote was given. But here there is admittedly no difficulty in so deciding. A mark put directly opposite the name of a particular candidate is to my mind a good vote.

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Solicitors for petitioners: *Lambert & Hale.*

J. F. C.

HOARE, APPELLANT; ROBERT GREEN, LIMITED, RESPONDENTS.

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April 26.

Factory—Workshop — Exercise of Manual Labour — "Article" — Natural Flowers made into Bouquets—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 149.

The respondents carried on the business of retail florists, and employed a number of young women and girls, whose duties consisted partly in serving customers in the shop and partly in making up natural flowers into wreaths, crosses, and bouquets, and arranging floral decorations, for which purposes frames of wood or wire were sometimes used, in a room behind the shop:—

Held, that the room was a place in which manual labour was exercised by way of trade in or incidental to the making of an article, or the adapting for sale of an article, within s. 149 of the Factory and Workshop Act, 1901, and that the room was, therefore, a workshop within the Act.

CASE stated by a metropolitan magistrate.

An information was preferred by the appellant against the respondents for that they on October 2, 1906, at a certain workshop, within the meaning of the Factory and Workshop Act, 1901, at Crawford Street, in the parish of Marylebone, of which workshop they were then the occupiers, did not affix the prescribed abstract of the Act as required by s. 128 of the Act. (1)

(1) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 128: "(1.) There shall be affixed at the entrance of every . . . . workshop and in such other parts thereof as an inspector for the time being directs and be constantly kept so affixed in the prescribed form and in such position as to be easily read by the persons employed in the . . . . workshop

"(*a*) The prescribed abstract of this Act."

Sect. 149: "(1.) Subject to the provisions of this section, the following expressions have in this Act the

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Upon the hearing of the information the following facts were either proved or admitted:—

The respondents were a limited company carrying on the business of florists at Crawford Street, Marylebone. The business was an ordinary florist's retail business. There was a shop in front and a room behind, which room was used as hereinafter stated.

The respondents permanently employed ten young women as florist's assistants, and eight girls as beginners, the ages of the assistants being from seventeen years to twenty-three years, and the ages of the beginners being from fifteen years to seventeen years. The young women and girls served in the shop and arranged flowers in the room behind, which they called the workshop. The above-mentioned room or workshop was the workshop in which it was alleged the prescribed abstract of the Factory and Workshop Act ought to have been affixed. The assistants were selected from the beginners on account of their artistic taste and without reference to their manual dexterity. These assistants were employed and paid throughout the year, although it was only during the months from May to July that there was sufficient business to occupy them fully, the reason being that the services of persons with the necessary artistic taste and skill could not be secured in any other way. In the other months of the year the assistants employed their spare time in practising and in teaching the beginners the artistic arrangement of flowers.

The assistants and beginners were employed in attending retail customers in the shop, in making bouquets, wreaths, and crosses, and in arranging floral decorations in the room behind. They

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meanings hereby assigned to them; that is to say:—

"The expression 'workshop' means—

"(*b*) any . . . . room . . . . in which . . . . any manual labour is exercised by way of trade or for purposes of gain in or incidental to any of the following purposes, namely—

"(i.) the making of any article or of part of any article; or

(ii.) the altering, repairing, ornamenting or finishing of any article; or

(iii.) the adapting for sale of any article,

and to or over which . . . . room . . . . the employer of the persons working therein has the right of access or control."

also went to private houses and hotels and arranged flowers. Part of the work of arranging floral decorations in the room behind the shop consisted of fastening flowers to frames of wood or wire. These frames were not made or sold by the respondents, but were purchased by them ready made and lent to their customers. Slight alterations to these frames had sometimes to be made; when this was necessary it was done by one of the men employed by the respondents who did not work in the room. This was done so rarely that it could not be said to be part of the ordinary business of the respondents. In arranging flowers upon the wire frames it was sometimes necessary to cover small parts with indiarubber tubing made in imitation of the bark of rose trees.

The respondents, as employers of the young women and girls, had the right of access and control over the room. The prescribed abstract was not affixed.

On the part of the appellant it was contended that the room was a workshop as defined by s. 149 of the Factory and Workshop Act, 1901.

On the part of the respondents it was contended that the room was not a workshop within the Act.

The magistrate held that the room was not a workshop within the meaning of the Act, and he therefore dismissed the summons.

The question for the opinion of the Court was whether his decision was correct in law.

Rowlatt, for the appellant. The magistrate should have convicted the respondents. The room was a "workshop" as defined by s. 149 of the Act. The work performed in the room by the respondents' employees, as described in the case, was the making of an article and also the adapting for sale of an article, for which purposes there was an exercise of manual labour: *Palmer's Shipbuilding Co.* v. *Chaytor* (1); *Fullers* v. *Squire*. (2)

Avory, K.C., and *R. D. Muir*, for the respondents. No offence was committed. Natural flowers are not articles within s. 149; and if the flowers are not articles within that section, the

(1) (1869) L. R. 4 Q. B. 209. (2) [1901] 2 K. B. 209.

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arrangement of the flowers in a particular form for the purpose of wreaths, crosses, or bouquets cannot be the making of an article or the adapting of an article for sale, even though a wire frame is employed in the process. It is a kind of work analogous to painting a picture or making a sculpture, neither of which could be accurately described as making an article. Secondly, there was no manual labour exercised in this room. The decisions under the Employers and Workmen Act, 1875, shew that there is a distinction between manual labour and manual work, in that the expression "manual labour" involves an exertion of the sinews and muscles, whereas manual work does not: *Cook* v. *North Metropolitan Tramways Co.* (1); *Bound* v. *Lawrence* (2); *Morgan* v. *London General Omnibus Co.* (3); *Reg.* v. *Louth Justices.* (4)

[DARLING J. referred to *Smith* v. *Associated Omnibus Co.* (5)]

The substantial duty of the young women employed by the respondents was the exercise of their artistic taste, and the employment of their fingers was merely incidental thereto. In *Fullers* v. *Squire* (6) the question turned on the words "adapting for sale," and the point as to manual labour was not raised. [*Maynard* v. *Robinson* (7) was also referred to.]

Rowlatt was called upon to reply as to the question of manual labour only. The definition section in the Employers and Workmen Act, 1875, where the words "manual labour" occur, is different both in scope and language from s. 149 of the Act of 1901. In the earlier Act the section was defining a particular kind of person, but in this Act it is a particular kind of place which is being defined. Decisions on the Act of 1875 are therefore no guide to the interpretation of this Act, where the question is not one as to the severity of the labour, but as to the conditions and locality in which the labour is carried on. If the user of the hands is the real and substantial work, and is not merely ancillary to the sale of an article, there is manual labour within this Act. For the purposes of this Act "manual

(1) (1887) 18 Q. B. D. 683.
(2) [1892] 1 Q. B. 226.
(3) (1884) 13 Q. B. D. 832.
(4) [1900] 2 I. R. 714.
(5) [1907] 1 K. B. 916.
(6) [1901] 2 K. B. 209.
(7) (1903) 89 L. T 136.

labour" and "manual work" are indistinguishable, and it is clear that no question can arise as to whether the labour is physically severe, for in s. 114 the expression "manual labour" is used in connection with such light work as straw-plaiting and pillow-lace making.

LORD ALVERSTONE C.J. This case raises an interesting and important point. It appears from the facts stated in the case that the respondents employ a certain number of young women as assistants, who are selected because of their artistic taste and skill without reference to their manual dexterity, and under the directions of these assistants are eight girls, who are called beginners. It is not suggested that these girls are selected for their artistic taste apart from their manual dexterity, but if they display artistic taste they may, and in all probability will, in course of time become assistants. Both the assistants and the beginners are employed in attending to the retail customers in the shop, and also in making bouquets, wreaths and crosses, and in arranging floral decorations in the room behind the shop.

If it had been found as a fact, as in *Bound* v. *Lawrence* (1), that what these young women did in the back room was only incidental to serving in the shop—for example, if they only went in and out of that room for the purpose of fetching flowers to the counter, or for the purpose of tying up in bunches flowers which had been sold in the shop—different considerations would be involved; but it must be inferred from the way in which this case has been stated that the work carried on in the room, which is not part of the shop, mainly consists of the production of crosses wreaths, and bouquets. It has been contended on behalf of the respondents that because the thing produced is a collection of natural articles untouched by hand, except, possibly, in some cases by the use of wire for the purpose of fastening, the cross, or wreath, or bouquet must be regarded as a natural article and not as an article which has been made or adapted for sale within the meaning of s. 149 of the Factory and Workshop Act, 1901. I am unable to accept that contention. In my opinion, having regard to the purview of that Act, and to the fact that the

(1) [1892] 1 Q. B. 226.

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intention of the Act was to enforce proper ventilation and sanitary accommodation, it would be a very dangerous thing to say as a matter of principle that the Act cannot apply to a case where natural articles, such as flowers, are arranged in a special form or made up in a special way. In my view the making of wreaths, crosses and bouquets, and even buttonholes, if a variety of different flowers is used for the purpose, constitutes both the making of an article and the adapting of an article for sale within this section.

I have had more difficulty in coming to a conclusion on the question as to whether this room is a place where manual labour was exercised by way of trade. It is, I think, clear that there must be some limit placed on the scope of these words, and I think that the question as to the limit is best answered by saying that, if the substantial purpose for which the place is used is the employment of persons in manual labour, then the Act applies. On the other hand, if the place is only incidentally used for the purpose of manual labour—if, for example, the place is a shop and the manual labour is merely incidental to the general business of the shop—then different considerations would arise. The particular room in question in this case was a room behind the shop, and the substantial purpose for which it is used is the making the articles described in the case. The work done in the room was not merely incidental to the sale of things in the shop, but was an independent and different class of work. I therefore come to the conclusion that, apart from any authority binding us, the place here was a place in which manual labour was exercised by way of a trade within s. 149. I only desire to say a very few words about the authorities. A series of decisions under the Employers and Workmen Act, 1875, has been cited. That Act provides that "the expression 'workman' . . . . means any person . . . . being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour." It has been decided that a grocer's assistant, the driver of a tramcar, and an omnibus conductor do not come within that section. I think that those cases were decided more upon the ground that the persons in question were not ejusdem generis with the classes of workmen specifically

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mentioned in the section than upon the meaning of the words "engaged in manual labour." There is this further distinction—the Act of 1875 is dealing with persons whereas the Act of 1901 is dealing with places, and, although the words "manual labour" occur in both Acts, the question which has to be considered with regard to the Act of 1875 is whether the main object of the person's employment is manual labour. If, in considering whether a particular room is a "place" within s. 149 of the Act of 1901, one finds that the place is used substantially for the purpose of manual labour, then it is subject to the provisions of the Act. I am of opinion that there is nothing in the cases which have been quoted to us to prevent our holding that this room comes within the Act of 1901, and this appeal must therefore be allowed.

DARLING J. I am of the same opinion. In my view a single cut flower is not properly to be described as an "article" within this Act, nor should I say that a bouquet is an article if it consists merely of a bunch of cut flowers, not wired, but tied together after selection and sale, and for convenience in carrying them away. But with regard to crosses, wreaths, and such like things as were made in this shop, constructed of flowers attached to frames of wood or wire, and, when finished, being thus made of composite materials, I think they are, when finished, properly to be called "articles" within the Act. They are made in the shop, and, therefore, the making of them constitutes the shop a workshop within the Act if the making of them necessitates manual labour. Now I am not convinced myself that there is any distinction—any accurate distinction, at all events—between "manual labour" and "manual work." I do not think that manual labour need be labour requiring a great exertion of strength, and it seems to me that the kind of labour indicated by this particular Act of Parliament may be very light labour indeed, for the Act appears to contemplate that even the plaiting of straw, which is a thing that one would do with one's finger and thumb, may be properly described as "manual labour," and if that were done in certain circumstances by certain people it would be manual labour within this Act of Parliament. That

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Darling J.

leads me to the conclusion that the arranging of these flowers in the shape of crosses and wreaths, using not only the natural flowers, but other things, is the making of them by "manual labour" into an "article," and therefore the place where that is done is a workshop within the meaning of this Act of Parliament.

PHILLIMORE J. I am of the same opinion. It is obvious that the word "article" here means something made or manufactured. How little dealing with the natural article produces a manufactured article is shewn by the case of *Kent* v. *Astley*. (1) Here I have no doubt that some at least of the products turned out from this room were articles within the meaning of this Act. It is not necessary to go into details as to which of the products were or whether all were not articles within the meaning of the Act. Then comes the question whether this room is a workshop. In my opinion it is a workroom, if not a shop, and therefore it is a workshop. No doubt, to bring the case within the Act, it is necessary that there should be manual labour, and no doubt we ought to go further and say that the manual labour must not be merely incidental to the principal part of the duty of the employee. Here, however, not merely the principal, but almost the only, part of the duty of the employee is to work in that room. Now on reflection I agree that there is a shade of difference of meaning between work and labour, and the word "labour" implies more laboriousness than the word "work," and I have looked at this Act in this case with that feeling present to my mind. Still, I am of opinion that these people are "engaged in manual labour." I really do not think it necessary to consider the question very much when once one has referred to s. 114. That section shews that the Act contemplates by manual labour such simple industries as straw-plaiting and pillow-lace making, industries which, unless prolonged to a great length, are not tiring. Apart from the inference to be drawn from this section, work of this kind or labour of this kind may be properly considered as manual labour. Just consider what would happen if we held the contrary; bonnet-making,

(1) (1869) L. R. 5 Q. B. 19.

millinery, and possibly even dressmaking, workrooms would be excluded from the purview of this Act. Can anybody who remembers Hood's "Song of the Shirt" and the woman who stitched from morning to night think that she was not engaged in manual labour? In my opinion these young women were engaged in manual labour and this room is a workshop within the meaning of the Act.

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Phillimore J.

Appeal allowed.

Solicitor for appellant: *Treasury Solicitor.*

Solicitor for respondents: *F. F. Palmer.*

F. O. R.

WESTERN, APPELLANT *v.* KENSINGTON ASSESSMENT COMMITTEE, RESPONDENTS.

1907

April 22.

London—Poor Rate—Valuation—Flats—Houses and Buildings let out in Separate Tenements—Rateable Value—Deductions from Gross Value—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *Sched. III.*

By s. 52 of the Valuation (Metropolis) Act, 1869, it is enacted that in calculating the rateable value of hereditaments for the purposes of the Act the percentage or rate of deductions to be made from the gross value shall not exceed the amounts in the Third Schedule to the Act.

The Third Schedule, which shews the several classes into which the hereditaments inserted in a valuation list are to be divided, contains in a foot-note a provision to the effect that the maximum rate of deductions prescribed therein shall not apply to houses or buildings let out in separate tenements, but that the rate of deductions in such cases shall be determined in each case according to the circumstances and the general principles of law.

The appellant was the owner and occupier of a building in the metropolis consisting of two shops on the ground floor, a flat on the first floor extending over both the shops, and two similar flats on the second and third floors. Each shop consisted of one room with a yard and small offices in the rear, and a basement. Each flat consisted of a suite of rooms reached by a common staircase approached from the street by a passage at the side of one of the shops. Each flat had its own outer door opening on to the staircase. The passage way had a door opening on to the street. The two shops and three flats were five separate rateable hereditaments:—

Held, that the building was a "house or building let out in separate tenements" within the meaning of the foot-note to the Third Schedule to the Act, notwithstanding that the shops and flats were separate rateable hereditaments; and that therefore, in arriving at the rateable values of the shops and flats, the assessment committee might allow deductions

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from the gross values at a rate greater than the maximum rate of deductions specified in the Third Schedule.

CASE stated by the court of quarter sessions for the county of London.

By s. 52 of the Valuation (Metropolis) Act, 1869, it is provided that the percentage or rate of deductions to be made from the gross value in calculating the rateable value of hereditaments for the purposes of the Act shall not exceed the amounts in the Third Schedule of the Act (1), so far as the same are applicable.

(1) "THIRD SCHEDULE

Shewing the several classes into which the hereditaments inserted in a valuation list under this Act are to be divided :—

	Maximum rate of deductions
	Per cent. or proportion.
Class 1. Houses and buildings, or either of them, without land other than gardens where the gross value is under 20*l.* . . .	25 or $\frac{1}{4}$th.
,, 2. Houses and buildings without land other than gardens and pleasure grounds valued therewith for the purpose of inhabited house duty where the gross value is 20*l.* and under 40*l.*	20 or $\frac{1}{5}$th.
,, 3. Houses and buildings without land other than gardens and pleasure grounds valued therewith for the purpose of inhabited house duty where the gross value is 40*l.* or upwards	$16\frac{2}{3}$ or $\frac{1}{6}$th.
,, 4. Buildings without land which are not liable to inhabited house duty and are of a gross value of 20*l.* and under 40*l.* . .	20 or $\frac{1}{5}$th.
,, 5. Buildings without land which are not liable to inhabited house duty, and are of a gross value of 40*l.* or upwards	$16\frac{2}{3}$ or $\frac{1}{6}$th.
. . . .	. .
,, 8. Mills and manufactories	$33\frac{1}{3}$ or $\frac{1}{3}$rd.
,, 9. Tithes, tithe commutation rent-charge, and other payments in lieu of tithe .	To be determined in each case according to the circumstances, and the general principles of law.
,, 10. Railways, canals, docks, tolls, waterworks, and gas works	
,, 11. Rateable hereditaments not included in any of the foregoing classes . . .	

The maximum rate of deductions prescribed in this schedule shall not apply to houses or buildings let out in separate tenements, but the rate of deductions in such cases shall be determined as in classes 9, 10, and 11."

The Third Schedule to the Act (1), after specifying the maximum rate of deductions in case of various classes into which the hereditaments inserted in a valuation list under the Act are to be divided, contains in a footnote a provision to the effect that the maximum rate of deductions prescribed in the schedule shall not apply to houses or buildings let out in separate tenements, but that the rate of deductions in such cases shall be determined in each case according to the circumstances and to the general principles of law.

The appellant was the owner of two blocks or buildings numbered respectively 101 to 103 and 107 to 109, Ladbroke Grove, in the royal borough of Kensington, in the county of London.

The block numbered 101 to 103, Ladbroke Grove, consisted of two shops on the ground floor, a flat on the first floor extending over both shops, and two similar flats on the second and third floors. Each shop consisted of one room with yard and small offices in the rear and a basement. Each flat consisted of a suite of rooms reached by a common staircase. The staircase was approached from the street by a passage at the side of one of the shops. Each flat had its own outer door opening on to the staircase. The passage way had a door opening on to the street. The block originally consisted of two private dwelling-houses, which had been converted as above. The two shops and three flats were five separate rateable hereditaments.

The block and building numbered 107 to 109, Ladbroke Grove, was similar to the block numbered 101 to 103.

In May, 1905, the valuation committee for the borough of Kensington made a new valuation list for the parish of Kensington. In that valuation list the said two blocks were mentioned as ten rateable hereditaments numbered 1134 to 1138 and 1140 to 1144 inclusive.

The appellant duly (2) made objection to the said valuation list, asking that the gross and rateable values might be altered, and duly appeared in support of his objection before the respondents on September 14, 1905.

(1) See note on p. 324.

(2) See Valuation (Metropolis) Amendment Act, 1884 (47 & 48 Vict. c. 5), s. 2.

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The respondents altered the gross and rateable values of some of the said hereditaments, and arrived at the rateable values by making deductions from the gross values in accordance with the Third Schedule to the Valuation (Metropolis) Act, 1869.

The appellant did not appeal from the decision of the respondents as far as regards the gross values of the said hereditaments, but duly appealed to the court of quarter sessions against the decision of the respondents so far as regards the rateable value of the said hereditaments, and claimed that the total rateable values of the said ten hereditaments should be reduced from 355*l.* the amount fixed by the respondents, to 288*l.*

It was admitted for the purposes of this case that the probable annual average cost of repairs, insurance, and other expenses necessary to maintain the said hereditaments in a state to command their rents was at least 140*l.*

If the deductions to be made from the respective gross values in order to ascertain the rateable values were to be determined by the rule mentioned in the footnote to the Third Schedule to the Act, then the respective rateable values of the said hereditaments ought to be the values claimed by the appellant.

The appellant contended before the court of quarter sessions :—

(1.) That each of the said two blocks or buildings let out in separate shops and flats was a "house or building let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Act;

(2.) That the maximum percentage or rate of deductions to be made from the gross value in calculating the rateable value under s. 52 and the second column of the Third Schedule of the said Act was not applicable to the said ten hereditaments, but the amount of deductions should be determined, as directed by the footnote to the Third Schedule, according to the circumstances and to the general principles of law.

The respondents contended that the said two blocks or buildings let out in separate shops and flats were not "houses or buildings let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Act.

The court of quarter sessions held that, in point of law, blocks

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or buildings let out in separate flats, as the blocks or buildings in question were let out, were not "houses or buildings let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Act, and adjudicated and determined that the respondents had properly estimated the rateable values, and accordingly dismissed the appeal; but stated a case for the opinion of the King's Bench Division, in which case the foregoing facts were set out.

The question for the opinion of the King's Bench Division was whether blocks or buildings so let out in separate flats as aforesaid are "houses or buildings let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Valuation (Metropolis) Act, 1869.

Ryde and *F. Giles*, for the appellant. Each of the blocks or buildings in question is a "house or building let out in separate tenements" within the meaning of the footnote to the Third Schedule to the Act. It can make no difference that each of the separate tenements is a separate rateable hereditament.

The reason why houses and buildings let out in separate tenements are exempt from the regulation, that in arriving at their rateable value no more than a certain prescribed maximum percentage or proportion is to be deducted from the gross value, is that in their case certain extra expenses, e.g., in respect of the guarding, cleansing, lighting, and repair of a common staircase, are necessary in order to maintain the houses and buildings in a state to command their reasonable annual rent, while in the ordinary case of a house or building not let out in separate tenements these extra expenses are not incurred. This reason must apply with equal force whether the separate tenements are or are not separate rateable hereditaments.

Avory, *K.C.*, and *Courthope Munroe*, for the respondents. What the Court has to deal with is a valuation list, i.e., a list of separately rated hereditaments. Each of these hereditaments is first assessed at a gross value, which by s. 4 of the Act means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the hereditament, if the tenant undertook to pay all usual tenant's rates and taxes,

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and tithe commutation rent-charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and other expenses, if any, necessary to maintain the hereditament in a state to command that rent. The rateable value of each hereditament is arrived at by taking the gross value and then deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid. By s. 52 of the Act the percentage or rate of deductions to be made from the gross value in calculating the rateable value for the purposes of the Act is not to exceed the amounts in the Third Schedule to the Act, so far as the same are applicable. The schedule purports to shew the several classes into which the hereditaments in the valuation list are to be divided. It is clear, therefore, that these sections and the schedule, and the methods which they prescribe for arriving at the gross and rateable values of hereditaments, relate to each separate rateable hereditament in the valuation list. Therefore the expression "houses and buildings" in the schedule means houses and buildings being separate rateable hereditaments in the valuation list. The special case states that the flats, and not the blocks containing them, are separately rated; and this could not be otherwise since the decision in *Reg.* v. *St. George's Union.* (1) It follows that the expression "houses and buildings" in the schedule indicates in the present case the separate flats themselves, and not the blocks containing them. Each flat is a house within the meaning of the schedule, just as each artizan's dwelling was held to be a house within the meaning of s. 94 of the Public Health (London) Act, 1891, in *Weatheritt* v. *Cantlay.* (2) The words "houses" and "buildings" must have the same meaning in the footnote to the schedule as they have in the body of the schedule itself. The fallacy of the argument for the appellant consists in taking, not each flat itself, but a block of flats, as the unit or rateable entity with which the Act, and particularly the Third Schedule, deals. In one sense, no doubt, a block of flats is a building let out in separate tenements; in the same sense a row of connected houses is a building let out in separate tenements, for it can make no difference that in one case the tenements are adjacent to each other while in the other

(1) (1871) L. R. 7 Q. B. 90. (2) [1901] 2 K. B. 285.

case some are subjacent to others: *Grant* v. *Langston* (1); *Yorkshire Fire and Life Insurance Co.* v. *Clayton* (2); but that is not the sense in which the words "houses and buildings let out in separate tenements" are used in the footnote to the Third Schedule. It has never been suggested that the owner of one side of a street could claim the benefit of that footnote. In the case of a flat the benefit of the footnote can only be claimed when the flat itself is let out in separate tenements.

[LORD ALVERSTONE C.J. The landlord of a house or building let out in separate tenements incurs the same extra expenses necessary to maintain the house or building or the separate tenements in a state to command a reasonable annual rent whether the separate tenements are or are not separate rateable hereditaments.]

That may be admitted; the answer is that the gross value of one flat in a block of flats does not include expenses incurred by the owner of a block in keeping up the common staircase. These and the like extra expenses ought not to be added to the gross value of the separate rateable hereditaments.

Ryde, in reply. It has been held that in the case of a building let out in separate rateable hereditaments extra expenses necessary to maintain the separate hereditaments in a state to command their rent must be taken into account in arriving at the gross value of the hereditaments: *Pullen* v. *St. Saviour's Union*. (3) The words "houses and buildings" in the Third Schedule and in the footnote thereto are used as merely descriptive, and not as technical, terms. They do not mean "houses and buildings being separate rateable hereditaments," because that expression would include mills and warehouses, which are separately dealt with in class 8, and therefore are not intended to be included in the words "houses and buildings." Those words are used in their ordinary sense, and must include a block or building consisting of shops and flats, and none the less because the shops and flats are separate rateable hereditaments.

LORD ALVERSTONE C.J. If it could be shewn that in the case of houses and buildings let out in separate rateable hereditaments

(1) [1900] A. C. 383. (2) (1881) 8 Q. B. D. 421.
(3) [1900] 1 Q. B. 138.

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Lord Alverstone C.J.

there would not be the same ground for allowing deductions on account of extra expenses as in the case of houses and buildings let out in weekly tenements, I should not have felt pressed by the argument for the appellant. But once it is admitted that in the case of a house or building let out in separate rateable hereditaments there would be the same extra expenditure entitling the occupier prima facie to the same extra deduction as in the case of a house or building let out in tenements to lodgers, both of which cases would come within the note to the schedule broadly construed, I see no reason why the occupier of a house or building let out in separate rateable hereditaments should not have the benefit of the provision in the footnote to the Third Schedule to the Act. Mr. Avory, for the respondents, admitted that in the latter case the same claim to deductions would exist as in the former; but he contended that that difficulty in his way might be met by excluding from the gross value all that might be attributable to the extra expenses founding any claim to deduction. Mr. Ryde, for the appellant, answered that contention by citing the authority of *Pullen* v. *St. Saviour's Union* (1), which decides that the amount of any payment of this kind made to the landlord to recoup him for an outlay which enhances the value of the occupation must be included in the gross value, though it may be deducted in arriving at the net rateable value. That being so, in a schedule such as that under discussion, directing certain deductions to be made, one would expect to find words wide enough to cover the case of a house or building let out in separate rateable hereditaments. This note was enacted with no view to the franchise or inhabited house duty, but simply deals with houses and buildings so conditioned that a hard and fast maximum deduction ought not in fairness to be applied, and that may be the case whether the house or building in question is let out in separate rateable hereditaments, or not. If the expenses are the same in both cases, the same benefit should be given in both cases.

Then, do the words in the note allow us to hold that this was the intention of the Legislature? I was much pressed by the argument of counsel for the respondents that the words

(1) [1900] 1 Q. B. 138.

"houses and buildings" occur both in the classes specified in the schedule and in the note, and one would expect, in ordinary circumstances, that the same words would have the same meaning in both portions of the schedule, and that, as in the classes mentioned in the schedule the words import separate rateable hereditaments, so the words in the note must have the same meaning. But that argument is not strong enough to induce me to give effect to what would appear to be an injustice. It may be that the houses and buildings referred to in the note must themselves be separately rateable when let out in tenements which are not separately rated. But if such houses and buildings are let out in separate tenements involving extra expenses, then whether the separate tenements are rateable or not is immaterial; I see no reason why a deduction should not be made in the one case as much as in the other. To apply the hard and fast maxima in the former case, and not in the latter, would in my opinion bring about an injustice. The words in the note are of themselves wide enough to cover both cases. I think, therefore, that the quarter sessions were wrong in holding that in the present case the only amount of deduction which could be allowed was that specified in classes 2 and 3 of the Third Schedule, and that this appeal must be allowed.

DARLING J. I am of the same opinion. I only desire to add that if the footnote to the schedule was not meant to apply to this case, it is difficult to see for what it was intended. The examples suggested by counsel for the respondents appear to me wholly insufficient as reasons for excluding from the benefit of the provision in the footnote the premises which are in question here.

PHILLIMORE J. I am of the same opinion. The strength of the argument for the respondents was that the expression "houses and buildings" in the footnote must have the same meaning as the expression "houses and buildings" in classes 1, 2, and 3. Then it was said that houses and buildings in classes 1, 2, and 3 must mean all rateable hereditaments which can be called houses, and must in the present case mean flats

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or portions of a house which is let out in separate rateable hereditaments, and, that being so, the words "houses and buildings" in the footnote must in the present case indicate the flats themselves, and not the blocks containing the flats. The answer to that argument is that in the earlier part of the schedule, and indeed throughout the schedule, the Legislature is not defining rateable entities or areas of rateability, but is merely indicating them by means of architectural and physical descriptions. The words "houses and buildings," occurring as they do in connection with gardens and pleasure grounds, shew what the Legislature had in view. A house with or without a garden, and with or without a pleasure ground, has to be valued after certain deductions have been made. That is the object in view, and it is irrespective of the question whether the house with or without a garden or pleasure ground is or is not one separate rateable hereditament. Then the word "buildings" must have some meaning other than "houses"; otherwise that word would be tautologous, and classes 4 and 5 in the schedule would be unnecessary. There is much force in the argument of counsel for the appellant that mills and manufactories would come within the expression "buildings" if that word were used otherwise than merely as a description of the outward appearance of the structures contemplated. Not being compelled to apply any technical meaning to the words "houses and buildings," I see no reason why the footnote to the Third Schedule should not have its natural meaning. In my view, when that which is physically one house or building is found to be divided into separate tenements, the deductions may be larger than those authorized under classes 2 and 3 of the schedule, whether those tenements are separate rateable hereditaments, or not.

Appeal allowed.

Solicitors for appellant: *Western & Sons.*

Solicitors for respondents: *Pontifex, Hewitt & Pitt.*

W. H. G.

MURGATROYD *v.* WRIGHT; BANNISTER, Claimant.

1907
May 3.

Practice—County Court—Writ of Execution—Time of Application for Writ—Where Registrar of County Court is also High Bailiff—Delivery of Writ to Officer charged with Enforcement—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 26.

Sect. 26 of the Sale of Goods Act, 1893, as applied to execution in county courts, must be construed as providing that the time from which a writ of execution, in a county court where the registrar is also high bailiff, binds the property in the goods of the execution debtor is the time at which application is made for the writ, and not the time at which the writ is delivered to the officer charged with the enforcement of it.

Quære whether the same rule does not apply in a county court where the registrar is not also high bailiff.

Appeal from the Lancashire County Court on the trial of an interpleader issue.

The plaintiff, having recovered judgment against the defendant in the county court, made application at 2.45 on November 13, 1906, for a warrant of execution to the registrar of the county court, who was also the high bailiff. Between 5 and 6 on the same day a bill of sale was executed by the defendant in favour of the claimant comprising the goods in question. The warrant of execution was indorsed as having been received by the bailiff on November 14, and the goods were seized that same day. The claimant gave notice of the bill of sale, and an interpleader issue was ordered.

The county court judge gave judgment for the claimant, and the plaintiff appealed. (1)

(1) By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26: "(1.) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same.

"Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained

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Cavanagh, for the appellant. Under s. 26 of the Sale of Goods Act, 1893, the property was bound at 2.45 on November 13, and the writ, therefore, has priority over the bill of sale, which was not executed till between 5 and 6 the same day. In a county court where the registrar is also the high bailiff it is the application for the writ which is the important date. This is shewn by the County Court Rules and Forms of 1903, which were issued after the passing of the Sale of Goods Act, 1893. Form 163 provides this indorsement of the warrant, "Application was made to the registrar for this warrant at minutes past the hour of in the noon of the day of 19 "; but there is no form for the indorsement by the bailiff of "the hour, day, month, and year when he received the same" as provided by s. 26. This shews that the material time in county court executions is the moment of the application for the writ. [He referred to *Woodland* v. *Fuller*. (1)]

C. C. Scott, for the respondent. The warrant for execution did not reach "the officer charged with the enforcement" of the writ till November 14, and therefore, on the proper construction of s. 26 of the Sale of Goods Act, 1893, it did not bind the property in the goods of the execution debtor till then. The claimant's bill of sale, therefore, has priority. The section is quite plain, and the time to be regarded is not the time of the application for the writ, but the time at which the writ was delivered to the officer charged with its enforcement. In the forms given to the County Court Rules, 1903, books K and L provide a column for entering the date when the warrant of execution is delivered to the bailiff. The Sale of Goods Act has restored the provision of the Statute of Frauds which was abrogated by the Mercantile Law Amendment Act of 1856, and has made the delivery of the writ to the sheriff, and not the issue of the writ, the important date: *Ex parte Williams*, *In re Davies*. (2) The claimant has had no opportunity of raising the points in the proviso to the section, and if the Court decides to

unexecuted in the hands of the sheriff.

"(2.) In this section the term 'sheriff' includes any officer charged with the enforcement of a writ of execution."

(1) (1840) 11 Ad. & E. 859.

(2) (1872) L. R. 7 Ch. 314.

reverse the decision of the county court judge the case must go down for a new trial.

Cavanagh replied.

PHILLIMORE J. My brother Darling has asked me to deliver our judgment. Several points were taken on behalf of the execution creditor. But the only point of substance is the question of priority as between the execution by the judgment creditor, and the title acquired under this bill of sale.

The facts can be stated in a few lines. An application for the warrant of the process of execution in the county court against goods was made at 2.45 on November 13. We do not know at what time or hour the actual warrant of execution was filled in, stamped, or sealed; the only thing we know is that it reached that part of the registry which is called the bailiff's office some time on the following day. The bill of sale in question was executed between 5 and 6 o'clock on the 13th. Another thing that may be material is that in this county court the registrar is also the high bailiff: therefore the bailiff's department is merely a department of the office of the registrar; and if there is any delivery of a warrant by the registrar to the high bailiff in this case, it is a delivery by him to himself.

Now to these facts we have to apply s. 26 of the Sale of Goods Act, 1893. The history of the legislation in this matter requires some brief narration. By the Statute of Frauds the title to goods taken in execution accrued at the date of the delivery of the writ; but by the Mercantile Law Amendment Act, 1856, the title to the goods was postponed, and did not accrue till the goods were actually taken in execution. By s. 26 of the Sale of Goods Act, 1893, the provision of the Statute of Frauds has substantially been restored; and, inasmuch as writs of execution in county courts have become a very important factor, there is an additional provision in that section to meet the case of executions by other officers than sheriffs. About the period when these later statutes were passed we have a great number of County Court Acts. Exactly what would have happened under the County Courts Act, 1846 (which was in force before the Mercantile Law Amendment Act, and therefore during the reign of the

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provision in the Statute of Frauds), we are not able to say. The Statute of Frauds, I think, spoke only of the sheriff. We are not able to say whether by analogy the high bailiff or the registrar, or some officer charged with the execution of the writ, would have been held to be in the same position as the sheriff, or whether the provision of the Statute of Frauds would be held to apply to county court executions at all. But the next important County Court Act received the royal assent the same day as the Mercantile Law Amendment Act, 1856. It became, therefore, no longer necessary to consider what was to be the initial date in the process of execution which would have entitled a judgment creditor to priority over other claimants, because the Mercantile Law Amendment Act, 1856, made the important moment the date of the actual seizure. Therefore the County Courts Act, 1856 had no special provision with regard to that; but it had provisions with regard to the priority of county court judgments inter se, and with regard to the priority of executions of county court judgments and of High Court judgments—provisions intended to enable what used to be called in the High Court of Admiralty "the more diligent claimant" ("prior petens") to have the advantage. Similar provisions were enacted by the County Courts Act, 1888, ss. 146 and 152. That Act, again, was passed during the reign of the Mercantile Law Amendment Act, 1856, and before the Sale of Goods Act, 1893. The County Court Rules, 1903, however, are later in date than the Sale of Goods Act, 1893. Now, those County Court Rules made no alteration with regard to the process of the county court in these matters. It still remains that the only epoch of time which any official of the county court is required to enter is the moment at which the application for the warrant is delivered to the registrar. There is no doubt that in the book (form L) the high bailiff, or the officer in the bailiff's department of the registry, is required to note the day, not the hour, but the day when the warrant is issued. That may well be for office purposes to provide that there shall be no slackness in these matters; and, as I pointed out in the course of the argument, whichever contention on this point was right, it is most important that the issue of the warrant should tread as closely as possible upon the heels of the application for the

warrant. Therefore, as I have said, those who framed these County Court Rules made no special provision to meet the Sale of Goods Act, s. 26, if such a provision was requisite. If it be necessary to consider the date when the writ reaches the high bailiff, or reaches the bailiff's department of the registry, there is no provision in the rules for knowing that date. The only provision is a provision which no doubt is wanted for other purposes, as well as for noting the date when the warrant was applied for.

In those circumstances, how are we to apply the Sale of Goods Act to the process of execution of the county court? There is one general principle, it seems to me, underlying this matter, and that is "Actus curiæ nulli facit injuriam." When one is dealing with writs of execution out of the High Court one must remember that, though the sheriff is an officer of the High Court in the sense that he is an officer to execute judgments of the High Court, he is not an officer of the High Court of Justice in the sense that he is a clerk or officer in the building of the Royal Courts, or that he is a clerk or officer with whom other officers of the Royal Courts may make communication automatically and without solicitation or process by the parties. The procedure as between the High Court and the sheriff is more archaic. It contemplates a time when there were few officials, and when the suitor had to be busy and bestir himself to get things done. The process is this. The suitor goes to the office of the High Court, delivers his præcipe, and he receives, or ought to receive, the writ of execution in a few minutes. Then he can put it in his pocket, and very often he does so. He afterwards lodges it with the sheriff, or he can go to the sheriff with it at once. The carriage of the writ from the office of the High Court of Justice to the sheriff entirely depends upon the suitor, and, therefore, for this purpose, it is not material to inquire the time of the application for the writ of fi. fa. The moment to inquire about is when the suitor lodged the writ of fi. fa. with the sheriff. From that moment the law supposes the sheriff will act with instantaneous promptitude. Therefore the Mercantile Law Amendment Act, 1856, has been repealed in this respect, and the Statute of Frauds has been restored. As soon as the suitor has done his part, from that moment he is not to be prejudiced by

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official delays. Now in the county court there is no carriage by the suitor of the warrant of execution from the registry to the high bailiff, still less from one part of the registrar's office to another. That is intended to be done by the officials themselves, and ought to be done with instantaneous promptitude, and any official delay should not prejudice the suitor. And so it would be according to the spirit of the Sale of Goods Act that the material date should be the date when the suitor set the law in motion by his last act, which would be in this case when he applied for the warrant at 2.45 on the 13th.

Now, how are we to reconcile the express terms of s. 26 of the Sale of Goods Act with the process of the county court, which, as I pointed out, has been left unaltered by those who framed these rules, notwithstanding the passing of the Sale of Goods Act? Sub-s. 2 says the term "sheriff" includes any officer charged with the enforcement of the writ of execution. The matter is simpler in this case than it might be in others. The registrar here is ex-officio high bailiff. He is the officer charged with the enforcement of the writ of execution. When is the writ delivered to him? Well, it may not be momentarily delivered to him, at 2.45, because "momentarily" would mean the same moment as the application. But within as many minutes as may be necessary for filling up the form—practically instantaneously—the writ ought to be delivered to him. When the registrar is not high bailiff, whether the words in sub-s. 2 include both the registrar and the high bailiff or not, the registrar is communicating directly with the high bailiff, and probably the rule of law is the same. In this particular case either the writ was delivered to the registrar when the application for it was handed to him, or it was delivered to the registrar the moment afterwards, when he ought to have drawn up the writ in conformity with the application. I may put aside such questions as the lodgment of the application after office hours. Here the application was made in ordinary office hours, and in a moment there ought to have been delivery of the writ to the proper officer.

Therefore, in our opinion, this point was wrongly decided by the county court judge, and the title to these goods vested in the

high bailiff or registrar acting on behalf of the execution creditor, or, to use the language of the statute, bound the property in the hands of the execution creditor at 2.45 on the 13th. Therefore this bill of sale prima facie would have to be postponed to the warrant of execution.

Then comes the point as to the proviso. Now the burden of proof of that proviso, which is a defeasance of the earlier part of the section, rests upon the holder of the bill of sale. He has to prove that he acquired the title to the goods in good faith and for valuable consideration after the goods had been bound by the writ, and before the seizure. If he does so prove, the burden is then shifted, and the execution creditor must prove that the holder of the bill of sale had notice of the writ of execution. Really that portion of the section seems hardly necessary, because if the bill of sale holder had notice he could hardly be acquiring the title to the goods in good faith. At any rate, those are questions of fact which have to be determined. The claimant under the bill of sale has got to prove, if he can, that he took it in good faith and for valuable consideration, and he may then have to rebut the charge that, nevertheless, he had notice of the execution. Now, none of these questions of fact were determined by the county court judge, because, in his view, they did not arise. We think that the claimant is entitled to have the judgment of the county court judge on those matters. Therefore, in our view, the matter must go down for a new trial upon those questions of fact.

New trial ordered.

Solicitors for appellant: *Hamlins, Grammer & Hamlin, for R. Knight, Morecambe.*

Solicitors for respondent: *W. J. & E. H. Tremellen, for Johnson & Tilly, Lancaster.*

A. P. P. K.

1907
April 25.

HOWE, Appellant; LICENSING JUSTICES OF NEWINGTON, Respondents.

Licensing Acts—Renewal of Licence—Reference to Quarter Sessions—Report of Licensing Justices—Matters not stated in Report—Evidence—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 2.

On the hearing by a committee of quarter sessions of an application for the renewal of a licence which has been referred to quarter sessions by the licensing justices under s. 1, sub-s. 2, of the Licensing Act, 1904, evidence as to the structural condition and the state of repair of the premises in question is admissible for the purpose of differentiating the premises from other licensed premises in the neighbourhood, although there is no mention thereof in the report of the licensing justices.

Case stated by the committee appointed by the court of quarter sessions for the county of London in pursuance of the Licensing Act, 1904.

At a duly appointed principal meeting held on July 3, 1906, at the Sessions House, Newington, the question of the renewal of the licence theretofore held by the appellant in respect of the Duke of Edinburgh beer-house, 92, Lower Park Road, Camberwell (an ante-1869 privileged beer-house), came up for consideration, under the Licensing Act, 1904, before the county licensing committee appointed by the court of quarter sessions for the county of London.

After hearing evidence on behalf of the renewal authority, and also on behalf of the appellant and the owners of the house, the committee refused the renewal of the licence, subject to this case.

The facts stated in the case were to the following effect:—

On February 12, 1906, a notice requiring the attendance of the appellant in person at the adjourned general annual licensing meeting of the justices was served by the justices' clerk on their behalf upon the appellant, giving as the ground for the requisition that the appellant's licence was not required having regard to the character and necessities of the neighbourhood.

On February 21, 1906, the adjourned meeting was held, and the justices, having heard evidence with regard to the Duke of Edinburgh beer-house, were of opinion that the question of the

renewal of the licence required consideration, on the ground that the licence was not required, and the justices referred the matter of the renewal to quarter sessions, with their report thereon.

The report stated, with regard to the Duke of Edinburgh, that "this beer-house was originally two cottages, the bar being built upon the forecourt, and there have been four transfers in the last four years. There are twenty-three on licences within the quarter-mile radius, and a fully licensed house, which is now being re-built, within 100 yards."

At the hearing before the committee on July 3, 1906, evidence was given on behalf of the renewal authority as to the number of licensed houses in the immediate vicinity of the Duke of Edinburgh. The renewal authority then tendered evidence as to the structural condition and state of repair of the Duke of Edinburgh for the purpose of shewing why the licence of this house in particular, as compared with that of two other licensed houses close by, was not required. Objection was taken on behalf of the appellant that the evidence was not admissible, upon the ground that no complaint was made in the report of the renewal authority as to the structure of the premises or their state of repair, and that the appellant consequently had had no notice that evidence would be given as to these matters.

The committee were of opinion that the evidence was admissible, and evidence was then given as to the structure of the premises and their state of repair, as compared with the two other licensed houses, and, after hearing evidence on behalf of the appellant and the owner of the house as to the trade done in the house and the character of the neighbourhood, the committee refused the renewal of the licence, subject to this case.

The question for the opinion of the Court was whether the evidence objected to was admissible.

Low, K.C., and *Wootten*, for the appellant. The evidence was not admissible. An applicant for the renewal of a licence, whose case is referred to quarter sessions, is entitled to know the grounds on which it is going to be said that his house, as distinguished from the other houses in the neighbourhood, is the one which ought not to have its licence renewed, and for this

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purpose the report states the matters with regard to each particular house which will have to be considered by the committee. The licensee is thus enabled to prepare his case and bring such evidence as he can to rebut the matters alleged against him. The report is really something in the nature of an indictment, and it must, therefore, be strictly adhered to, otherwise great injustice would be worked. In the present case there is not a word of complaint in the report as to the structural condition or the state of repair of the appellant's house, and it may be that, if the appellant had had notice that these matters were going to be inquired into, he could have brought evidence to refute or minimize the allegations made against the house in this respect, but in the circumstances he was, of course, quite unprepared to deal with them.

Avory, K.C., and *Cecil Whiteley*, for the respondents, were not called upon.

LORD ALVERSTONE C.J. The question in this case is one which has not been the subject of any express decision of this Court, but the principle upon which it depends is, in my opinion, involved in several cases which have been decided as to the procedure to be followed by the committee of quarter sessions when dealing with the question of the renewal of licences which have been referred to the committee for consideration. It must be borne in mind that under s. 1 of the Licensing Act, 1904, the matter comes before the committee on the report of the justices, and that that report is made when the renewal authority, that is, the justices, have come to the conclusion that the question of the renewal of any particular existing on licences requires consideration on grounds other than those on which they can refuse the renewal. Now, in *Rex* v. *Tolhurst* (1), this Court had to consider the question as to what, if any, evidence must be given before the renewal authority in order to justify the authority in referring the question of the renewal of an existing licence to quarter sessions, and in delivering the considered judgment of the Court I said (2): "The amount of evidence, however, which may be sufficient for the purpose

(1) [1905] 2 K. B. 478. (2) [1905] 2 K. B. at p. 491.

of enabling the justices to form the opinion indicated in the section may, in our judgment, be properly treated as different from the amount which could be regarded as sufficient if they had to decide judicially whether or not the particular licence should be renewed or refused." Then, in *Dartford Brewery Co.* v. *London County Quarter Sessions* (1), the question was considered as to whether in the proceedings at quarter sessions the report itself was evidence, and it was held that it was not, and that there must be evidence given on oath differentiating the particular house in question from the other licensed houses in the neighbourhood. The cases shew that the committee of quarter sessions can only act on legal evidence, but they nevertheless have a very wide discretion as to the matters which they may take into consideration. The question as to whether a particular licence shall not be renewed must depend on a comparison between the house in question and the other houses in the neighbourhood. That is a matter which can only be dealt with in detail by the committee of quarter sessions, and it is obviously one which must depend on a great variety of considerations, and it would, in my opinion, be quite impossible to carry out the intention and policy of the Licensing Act, 1904, if it were to be held that the report was to be construed with the strictness that one applies to an indictment, and that the committee were not entitled to receive evidence as to matters which could not be found within the four corners of the report.

In the present case it might, I think, very well be contended that the report does refer to the structure of this beer-house, for it states that the beer-house was originally two cottages, the bar being built upon the fourcourt; but, assuming for the purpose of argument that the report had contained no reference of any sort to the structure of the house, I am clearly of opinion that the evidence as to the structure and as to the condition of repair of the premises was admissible. The appeal must, therefore, be dismissed.

DARLING J. I am of the same opinion. I think that the question becomes quite plain if one considers the course of procedure

(1) [1906] 1 K. B. 695.

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provided by the Licensing Act, 1904, with regard to the refusal of applications for the renewal of licences. If the justices of a licensing district come to the conclusion that the question of the renewal of any particular on licences requires consideration on grounds other than those on which the renewal can be refused by them, they have to refer the matter to quarter sessions, and they make a report in which they recommend the suppression of the licences of the houses specified. That report is not evidence, and the facts on which the justices have recommended the non-renewal of the licences must be proved before the committee of quarter sessions; and it has been decided that before any particular licence can be put an end to, there must be some evidence differentiating the particular house in question from the other houses in the district. Now it may very likely happen that there is in the report itself nothing which can be made evidence of differentiation, and, since the committee cannot refuse to renew a licence without having before them some evidence of differentiation, it follows that they must in that case have evidence before them which goes beyond the matters which have been specifically referred to in the report. Unless that is done, the matters come to an impasse, and that which the Legislature contemplated as happening under the Act of 1904, namely, the refusal by quarter sessions of an application to renew a licence, which has come before them on a report from the justices, could never take place. For these reasons I am of opinion that the committee acted rightly in the present case in admitting evidence as to the structure and state of repair of this beer-house for the purpose of comparing it with the other houses in the neighbourhood.

PHILLIMORE J. I agree.

Appeal dismissed.

Solicitors for appellant: *Maitlands, Peckham & Co.*
Solicitor for respondents: *Sir Richard Nicholson.*

F. O. R.

HADWELL *v.* RIGHTON.

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May 14.

Trespass—Damages—Remoteness—Fowls straying on Highway—Damage to Passenger—Liability of Owner.

The plaintiff was riding a bicycle on a highway upon the footpath of which were some fowls belonging to the defendant. As the plaintiff got abreast of the fowls a dog belonging to a third person frightened the fowls, one of which flew into the spokes of the machine, causing it to upset, whereby the plaintiff suffered personal injury and the bicycle was damaged:—

Held that, even if the fowl was not lawfully on the highway the circumstances under which the accident happened prevented the damage from being the natural consequence of its presence there, and that the plaintiff could not recover.

Quære whether the occupiers of land adjoining a highway are not entitled to allow their poultry to stray about the highway?

Appeal from the Birmingham County Court.

The plaintiff was riding a bicycle at the rate of about six miles an hour down a highway called Bordesley Park Road, when he saw in front of him on the footpath three fowls. When he got abreast of the fowls all three suddenly fluttered up, and one of them flew into the spokes of his bicycle and he was upset, with the result that he suffered personal injuries and his bicycle was damaged. The fowls were the property of the defendant, who occupied premises on the side of the road opposite to the footpath on which the fowls were immediately before the accident. The cause of the fowls starting to fly across the road was that they were frightened by a dog which came out of premises adjoining those of the defendant on which the fowls were kept, and either ran at or barked at them. The plaintiff was riding carefully, and the accident happened through no fault of his. The defendant knew that the fowls were in the habit of straying out into the road. The county court judge held that the damage was too remote a consequence of their being allowed to stray there, and gave judgment for the defendant. The plaintiff appealed.

Avory, K.C., and *Simey*, for the plaintiff. The owner of an animal is liable for its trespasses. He keeps it at his peril, and if it escapes from his premises he is responsible for any damage

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that naturally results from its escape. Here the fowl, by escaping on to the highway, naturally caused an obstruction of the way. Its presence on the road was a nuisance, and the damage done was the direct consequence of that nuisance. It was not the less direct because it could not be antecedently contemplated as the probable result of allowing the fowls to stray. The case of *Cox* v. *Burbidge* (1), where it was held that the owner of a horse which strayed on a highway and then kicked a child was not liable in the absence of notice that the animal was accustomed to kick mankind, is distinguishable. For there the damage was not the natural result of the horse's presence in the road, but was the result of an act done by the horse contrary to its known disposition. Here the damage is the result, not of an act done by the fowl, but of its very presence on the road without more. What is complained of is that it caused an obstruction to the right of passage. The case is the same as if some inanimate object had been carelessly left lying in the middle of the road and the plaintiff had ridden against it in the dusk. The case of *Lee* v. *Riley* (2) supports the plaintiff's contention. There the defendant's mare strayed into a field of the plaintiff in which was a horse. From some unexplained cause the animals quarrelled, and the defendant's mare kicked the plaintiff's horse and damaged it. It was held that the damage was not too remote. And the case of *Ellis* v. *Loftus Iron Co.* (3), where the facts were very similar, was decided in the same way.

[BRAY J. But in those two cases the plaintiff was the owner of the land on which the animal was trespassing. Is there any case in which an action has been held to lie for similar damage done upon a highway at the suit of a person who was not the owner of the soil?]

That the plaintiff here is not the owner of the soil of the highway, so that the presence of the fowl upon it was not a trespass as towards him, is not material. It was wrongful towards him as interfering with his right of passage, and, as he has suffered a special damage, an action lies. "If there be an act done upon any part of the highway which is not a part of

(1) (1863) 13 C. B. (N.S.) 430. (2) (1865) 18 C. B. (N.S.) 722.
(3) (1874) L. R. 10 C. P. 10.

the reasonable user of it, and which has the effect of endangering its use to others, and damage results from such act in the course of a lawful user of the highway, an action will lie for such damage": per Denman J., *Harris* v. *Mobbs*. (1) It was an unlawful use of the highway to allow the fowls to stray about it, just as much as to allow of its obstruction by horses. "The King's highway," said Lord Ellenborough in *Rex* v. *Cross* (2), "is not to be used as a stable yard," neither is it lawful to use it as a poultry run.

[BRAY J. referred to the case of *Milns* v. *Garratt* (3), where a blind dog in a public street ran into, or was run into by, a cyclist, who was thereby upset and injured, and it was held by the Divisional Court that no action lay against the owner of the dog.]

That case, which is not reported elsewhere, may possibly be explained upon the ground that dogs seem to stand upon a peculiar footing. They are accorded a special privilege according to the old authorities, because they are not the subjects of larceny at common law: per Holt C.J., *Mason* v. *Keeling*. (4)

McCardie, for the defendant, was not called upon.

PHILLIMORE J. I propose to rest my decision in this case upon *Cox* v. *Burbidge*. (5) The passage in that case to which I would specially refer is in the judgment of Erle C.J.: "To entitle the plaintiff to maintain the action it is necessary to shew a breach of some legal duty due from the defendant to the plaintiff; and it is enough to say that there is no evidence to support the affirmative of the issue that there was negligence on the part of the defendant for which an action would lie by the plaintiff. . . . . But even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner

(1) (1878) 3 Ex. D. 268, at p. 271. (3) Times, March 6, 1906.
(1812) 3 Camp. 224. (4) (1700) 1 Ld. Raym. 606.
(5) 13 C. B. (N.S.) 430, 436.

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knows it." In the present case the county court judge assumed that the fowls were unlawfully upon the highway as they were not using it for the mere purpose of passage either in the company of their owner or without him. Even if we adopt that assumption, was the damage which in fact happened of such a nature as was likely to result from their unlawful presence there? There was no antecedent probability that the fowl would be frightened by a dog, still less was there any probability that if so frightened it would fly into the spokes of a bicycle. The owner was not bound to contemplate such a result as likely to flow from his letting the fowls be at large upon the road. Even if the fowl was wrongly upon the highway it would have done no harm but for the wrongful act of the animal of a third person. In the course of endeavouring to avoid one danger it runs into another. And in such a case "Causa proxima non remota spectatur." The negligence, if any, of allowing the fowl to be there was not connected with the damage. Apart from the action of the dog there was no evidence that fowls are in the habit of flying into passing bicycles.

So far I have assumed that the county court judge was right in treating the fowl as wrongfully upon the highway, but I cannot allow the case to pass without saying that I think the plaintiff's counsel have put too narrow a limitation upon the uses to which a highway may lawfully be put. It was said that the rights of members of the public in a highway were confined to passing and repassing, and that animals, except when accompanied by their owners, had no right to be on the highway at all. In the first place, I think that members of the public, in addition to using it eundo et redeundo, are also entitled to use it morando for a short time. And I doubt whether, even with that addition, the lawful uses are thereby exhausted. For instance, if fowls are kept near a highway, and there is a corn stubble belonging to their owner on the other side of the road to which they might naturally and properly go, I am not prepared to say that to allow them to go there by themselves would be an unlawful use of the highway by their owner simply because they might while so doing run or fly into some one who was riding a bicycle. The appeal must be dismissed.

BRAY J. I am of the same opinion. We cannot decide this case in the plaintiff's favour without overruling *Cox* v. *Burbidge*.(1) We have no power to overrule it, nor should I be inclined to exercise that power if we could. It is said that the fowl was trespassing. But the cases which were relied upon as shewing that that would give a cause of action were cases in which the plaintiff was the owner of the soil on which the trespass was committed, and are consequently not in point, for here the cyclist had no interest in the soil of the highway. The plaintiff's case could only be rested on the ground of negligence, as in the case of *Harris* v. *Mobbs* (2), where the defendant left a house van on the grassy side of a highway for the night, and a horse being driven along the road was frightened by it and bolted. Denman J. there held the defendant responsible for the consequences, but he did so upon the ground that the jury had in effect found "that there was an unreasonable and dangerous occupation of a part of the highway amounting to an obstruction and prevention of its free user by the public to an extent which was unreasonable." Where is there anything dangerous in letting fowls stray on a highway? The business of farming could not be conveniently carried on if such an act were not permissible. Homesteads are usually near a road, and it is practically impossible to keep fowls in. I should not hesitate to find that there was no danger at all in allowing them so to stray. Such an accident as this I have never heard of before. And, in the absence of anticipated danger, there is no room for the suggestion of negligence.

Appeal dismissed.

Solicitors for plaintiff: *Tiddeman & Enthoven, for Grey & Cox, Birmingham.*

Solicitors for defendant: *Judge & Priestley, for Philip Baker & Co., Birmingham.*

(1) 13 C. B. (N.S.) 430.

(2) 3 Ex. D. 268.

J. F. C.

C. A.
1907
May 1, 2.

[IN THE COURT OF APPEAL.]

LACONS AND OTHERS *v.* WARMOLL.

Executor—Devastavit—Statute of Limitations—Claim on Guarantee—Trustee Act, 1888 (51 & 52 *Vict. c.* 59), *s.* 8, *sub-s.* 1 (*b*)—*County Court Rules*, 1903, *Order xxx., rr.* 3, 4; *Form* 238.

In an action commenced in the High Court in 1905, and transferred to the county court, against one of two executors of a testator, who died in 1897, in respect of claims accruing due in 1903 and 1904 upon a guarantee given by the testator, the plaintiffs alleged a devastavit to have been committed by the defendant, in wrongfully handing over assets of the testator to a beneficiary under the will in 1898, more than six years before the commencement of the action, without making any provision for future liability under the guarantee. The county court judge having given judgment for the plaintiffs, adjudging that the defendant had committed a devastavit, and ordered execution against the defendant de bonis propriis:—

Held (reversing the judgment of Kennedy and A. T. Lawrence JJ.), that the claim in respect of the devastavit was barred by the Statute of Limitations, and therefore the order for execution de bonis propriis was wrong.

Quære whether the Trustee Act, 1888, s. 8, sub-s. 1 (*b*), applies to such a case.

APPEAL from the judgment of a Divisional Court (Kennedy and A. T. Lawrence JJ.) on an appeal from a judgment of the deputy judge of the county court of Norfolk.

The action, which was commenced on June 16, 1905, had originally been brought in the High Court, but was remitted to the county court. The plaintiffs thereby sued the defendant, Charles Frederick Warmoll, as one of the executors of the will of Edward Warmoll, deceased, the claim, as stated in the indorsement on the writ and the plaint note in the county court, being "for 76*l.* 9*s.* 8*d.*, amount of premiums on policies on the life of Edward Henry Warmoll, and for which the deceased was liable under a guarantee."

The particulars stated in the indorsement on the writ and plaint note claimed in respect of divers sums paid by the plaintiffs for premiums on such policies as aforesaid, the dates of the payment of these sums respectively being June 27 and

November 4, 1903, and June 28 and November 3, 1904. The plaint did not allege a devastavit.

The defendant gave notice of special defences as follows:—(1.) That the defendant has fully administered all the assets of the testator Edward Warmoll that have come to his hands; (2.) that, if he has committed any devastavit, which is not admitted, with regard to the said assets, such devastavit was committed more than six years before the commencement of this action, and he will rely on the Statute of Limitations, by which any such claim is barred; (3.) that the claim for which the defendant is summoned is barred by a Statute of Limitations. (1)

It appeared at the trial in the county court that Edward Warmoll, deceased, had appointed the defendant and one William Frederick Warmoll, a son of the testator, to be executors of his will, the last mentioned being also residuary legatee under the will. The testator had, by a guarantee dated October 7, 1891, guaranteed to the plaintiffs, who were bankers, the payment of the premiums on certain policies of insurance upon the life of another son of the testator named Edward Henry Warmoll, which policies had been effected by way of security for an advance made by the plaintiffs to Edward Henry Warmoll. The testator having died, his will was proved in 1897 by both the executors. After payment of certain debts of the testator, in February, 1898, the defendant signed cheques by means of which the balance of the testator's estate, which consisted of money in a bank, was paid over to the residuary legatee, William Frederick Warmoll, no provision having been made for any future liability on the guarantee. The county court judge found as a fact that the defendant had at that time notice of the guarantee. William Frederick Warmoll duly paid the premiums on the above-mentioned policies till June, 1903, when, a premium on one of the policies accruing due, he gave notice to the plaintiffs that he was not in a position to meet it. The plaintiffs thereupon paid it, and demanded payment of the amount from the defendant. That amount and premiums on the other

(1) It appeared that in correspondence with the defendant the plaintiffs had alleged that assets had been wrongfully parted with by the defendant.

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policies, which had since become due, and which the plaintiffs had been obliged to pay in order to keep up the policies, formed the items mentioned in the particulars given by the indorsement on the writ and the plaint note. It was argued in the county court that any claim in respect of a devastavit in 1898 was barred by the Statute of Limitations.

The judgment of the deputy county court judge, which was in Form 238 of the County Court Forms, 1903, adjudged that the plaintiffs should recover against the defendant the sum of 76*l.* 9*s.* 8*d.* for debt (1), and ordered that the defendant should pay the same on or before December 1, 1905. It further adjudged that the defendant, being one of the executors of the said deceased, had made away with and wasted divers moneys, to the amount of the said sum, which were the property of the said deceased, and which came to the hands of the defendant as executor to be administered; and the judgment further ordered that, if the defendant should make default in payment of the said sum, the same should be levied by distress and sale of the goods and chattels which were of the said deceased, and which came to the hands of the said defendant as executor, if the defendant had so much thereof in his hands to be administered, and if he should not have so much thereof in his hands to be administered, then that the said sum should be levied of the proper goods and chattels of the defendant.

The defendant appealed against so much of the judgment as adjudged that the defendant had been guilty of a devastavit, and ordered the said sum to be levied of the proper goods and chattels of the defendant, on the ground (inter alia) that, if there was any evidence of a devastavit, it occurred more than six years before action brought, and that the deputy county court judge was wrong in holding that the Statute of Limitations did not apply, and that he was not barred from giving judgment against the executor personally on that ground.

The Divisional Court held that it was clear that, although the action was described in the particulars of claim simply as an action of contract, it was treated at the trial as an action in which

(1) The provisions of the judgment as to costs are omitted as immaterial to this report.

were included the two stages of procedure which were formerly usual, namely, the first, the action against an executor as such, resulting, if the creditor succeeded, in a judgment de bonis testatoris, and then, if there were no assets of the testator to satisfy the judgment, the further action against the executor by the creditor, suggesting a devastavit, upon which the defendant would be personally liable, de bonis propriis: see Williams on Executors, 10th ed. pp. 1597—1599; and that, inasmuch as the plaintiffs had no cause of action till 1903, when default was first made in the payment of the premiums under the guarantee, the defence on the Statute of Limitations could not be maintained. They therefore dismissed the appeal. (1)

C. A. Russell, K.C. (*A. H. Poyser* with him), for the defendant. (2) In this case the action was brought against one of two executors in his representative capacity in respect of a liability of the testator. The county court judge, instead of merely giving the only judgment against the defendant which he could properly give in such an action, namely, a judgment for recovery of the amount claimed de bonis testatoris, or of assets quando acciderint, proceeded to find a devastavit, and to give judgment against the defendant de bonis propriis, as if the action had been against the defendant personally, alleging a devastavit. If he treated the plaint as amended by alleging a devastavit, he was bound to give effect to the defence of the Statute of Limitations. The County Court Rules, 1903, provide that a party suing an executor or administrator may charge in the summons that the defendant has had assets and has wasted them, and a form of judgment is given to be used in such a case, if the county court judge finds that there has been a devastavit: see Order xxx., rr. 3, 4, and Form 238 of the County Court Forms. The procedure so given was not adopted by the plaintiffs in this case, and no amendment

(1) A number of other points besides that with regard to the Statute of Limitations were taken in the Divisional Court on which their decision was against the defendant, and which have not been thought to call for a report.

(2) It will be observed that, though several other points were taken in the Divisional Court, the only point argued in the Court of Appeal was that on the Statute of Limitations, the decision on that point rendering the others immaterial.

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appears to have been made in the county court. Assuming, however, that, having regard to the way in which the case was dealt with in the county court, it must now be treated as if the plaint had been framed in accordance with the provisions of Order xxx., rr. 3, 4, the devastavit occurred more than six years before action brought, and therefore any claim in respect of it is barred. It was held by Page Wood V.-C. in *Thorne* v. *Kerr* (1) that, where the foundation of the action is the alleged devastavit, the plaintiff's claim against the executor personally is barred after six years. That decision was followed by Bacon V.-C. in *In re Gale*. (2) The judgment in the Divisional Court appears to have been based on the fact that the debt originally sued for, namely, that on the guarantee, did not accrue till 1903, but that is immaterial. That debt is not a debt or liability of the executor personally, but of the testator. The personal liability of the defendant depends on the devastavit.

It is contended that executors as such come within the Trustee Act, 1888, and therefore, even if the Statute of Limitations (21 Jac. 1, c. 16) would not apply, the defendant's liability in respect of parting with the assets in 1898 is barred by s. 8, sub-s. 1 (*b*), of the Trustee Act, 1888. [He cited on this point *How* v. *Earl Winterton*. (3)] *In re Marsden* (4) was an administration action, and *In re Hyatt* (5) was a case in which an account was claimed from executors. Different considerations apply to such actions, and those cases do not conflict with *Thorne* v. *Kerr* (1) or *In re Gale*. (2)

Stewart-Smith, *K.C.*, and *Ernest E. Wild*, for the plaintiffs. It may perhaps be admitted that the Statute of Limitations is applicable to a claim in respect of a devastavit, but the question here is, from what date the statute began to run. The period of limitation under the Statute of Limitations (21 Jac. 1, c. 16) runs from the accruing of the cause of action. No debt or liability on the guarantee could accrue to the plaintiffs against the testator while he lived, or against his executors after his death, until there was a failure to pay a premium becoming due on one of

(1) (1855) 2 K. & J. 54.
(2) (1883) 22 Ch. D. 820.
(3) [1896] 2 Ch. 626, at p. 633.
(4) (1884) 26 Ch. D. 783.
(5) (1888) 38 Ch. D. 609.

the policies, which did not occur till 1903. Until after that happened, the plaintiffs could have no right of action, and could take no proceedings in respect of a devastavit. The liability of the defendant to the plaintiffs in respect of not having kept assets in hand to satisfy the plaintiffs' claim did not accrue until after the plaintiffs' claim had accrued. There cannot be a cause of action till there is a right to sue. The contention for the defendant involves the position that the statute is running against any claim of the plaintiffs with respect to the wrongful parting with the assets, while the plaintiffs have no claim and can take no proceedings in respect of it. It was held in *In re Hargreaves* (1) that trustees of an annuity payable by a testator were not creditors when there was no payment due in respect of the annuity, and therefore they could not take proceedings for administration of the estate. Before the plaintiffs could take any proceedings against the defendant in respect of a devastavit, they must first have established that a debt has accrued to them as against the testator's estate. There is no authority for any proceedings in respect of a devastavit until judgment de bonis testatoris has been obtained against the executor in his representative capacity. At the time when the parting with the assets, which is alleged to be a devastavit, in this case occurred, the liability of the testator's estate in respect of the guarantee was merely contingent, and it was quite uncertain whether there would ever be any debt or actual liability on the guarantee. The period of limitation could only begin to run after a liability on the guarantee had accrued due in præsenti, and that might never have happened. The practice in the Superior Courts appears from the authorities to have been that if, upon the fieri facias issued on the judgment de bonis testatoris, the sheriff returned nulla bona testatoris, and, as he might do, also a devastavit, the plaintiff could immediately sue out a fieri facias de bonis propriis against the defendant. If the sheriff merely returned nulla bona testatoris, the plaintiff could obtain execution de bonis propriis of the executor, if there had been a devastavit, by scire fieri inquiry. The plaintiff might also proceed by action on the judgment against

(1) (1890) 44 Ch. D. 236.

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the defendant as executor, suggesting a devastavit: see Bullen and Leake's Precedents of Pleading, 2nd ed. p. 494; Williams on Executors, 10th ed. pp. 1597—1599. All these modes of procedure presuppose an antecedent judgment in respect of a debt against the testator's estate. It is contended, therefore, that a right to proceed against the executor for a devastavit can only accrue after a debt has accrued payable, and has been established in law, as against the testator's estate. If the contention for the defendant is well founded, then, wherever there is a prospective liability of the testator to make payments—it may be extending over many years, as in the case of the lessee of a long lease—the executors may hand over the assets to the beneficiaries, and if the payments are kept up during the period of limitation, then, in respect of any payments accruing afterwards, all liability for a devastavit will be barred by the statute. Cases such as *Thorne* v. *Kerr* (1) and *In re Gale* (2), where there was a debt already due and payable as against the testator's estate at the time of the wrongful parting with assets by the executor, are distinguishable from the present case.

In the cases of *In re Marsden* (3) and *In re Hyatt* (4) it was held that an executor cannot be heard to say that he has wrongfully wasted or paid away assets of the testator, but must be treated as having the assets so paid away still in his hands. At common law the same principle applies. If an executor fails to prove a plea of plene administravit, and judgment consequently goes against him de bonis testatoris, he cannot be heard afterwards to allege that he has committed a devastavit, the remedy for which is statute-barred, and is estopped from denying that he has assets in his hands: see per Chitty J. in *In re Hyatt*. (5) The defendant here set up by way of defence that he had fully administered the estate of the testator that came to his hands. On the issue on that defence it appeared, no doubt, that he had wrongfully paid away the assets so long ago as 1898, but the plaintiffs are entitled to judgment against him on the footing that he must account for the amount which he has so wasted as if he

(1) 2 K. & J. 54.
(2) 22 Ch. D. 820.
(3) 26 Ch. D. 783.
(4) 38 Ch. D. 609.
(5) Ibid. at pp. 615, 616.

still had it in his hands. [They also cited on this point *In re Beeman* (1); the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), ss. 27—29; Williams on Executors, 10th ed. p. 1589; Darby and Bosanquet on Statutes of Limitations, 2nd ed. p. 250.]

The Trustee Act, 1888, s. 8, sub-s. 1 (*b*), is not applicable to the present case. It is true that by s. 1, sub-s. 3, of the Act the expression "trustee" is to be deemed to include an executor or administrator, but it is contended that, having regard to the general scope of the Act, it applies to an executor or administrator only when acting in a capacity analogous to that of a trustee, e.g., in his relation towards beneficiaries under the will, and not in his relation towards creditors, who are not in the nature of cestui que trusts.

C. A. Russell, K.C., for the defendant, in reply. It is true that the cause of action originally stated in the plaint did not arise till 1903; but, if the action is to be treated as confined to that, the judgment in the county court was clearly wrong, because on the plaint as framed the judgment could only be de bonis testatoris, whereas the county court judge has gone on to give judgment against the defendant personally de bonis propriis. The plaintiffs must elect either to rest upon the cause of action as disclosed in the particulars, or to treat the claim as amended by turning it into a claim against the defendant personally on the ground that he has been guilty of a devastavit. If the claim had been so framed, the defendant would have pleaded the Statute of Limitations, and it is submitted that on that plea he would have been entitled to succeed. In an action against an executor sued as such merely, the only judgment for the debt is a judgment de bonis testatoris. Where, in the Superior Courts, a plea of plene administravit was pleaded by an executor sued as such, and he failed upon the issue on that plea, nevertheless the judgment against him was only de bonis testatoris. Then, if to a fieri facias the sheriff returned nulla bona testatoris, the plaintiff could sue on the judgment against the defendant as executor, and set out the return of the sheriff, and suggest a devastavit. But that action was not on the original debt of the testator, but in respect of the personal liability of the defendant

(1) [1896] 1 Ch. 48.

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for wrongfully dealing with the assets, and the period of limitation must run from the wrongful act in so dealing with them. The plaintiffs' complaint is that, there being a duty to make provision for their claim, the defendant made it impossible for him to perform that duty when he handed over the balance of the estate to the residuary legatee in 1898, but that breach of duty took place more than six years before the action.

Cur. adv. vult.

May 2. LORD ALVERSTONE C.J. In this case the Divisional Court affirmed the judgment of the deputy county court judge, by which the defendant, one of the executors of the will of Edward Warmoll, deceased, was made personally liable for amounts claimed by the plaintiffs in respect of premiums on policies of insurance, the payment of which had been guaranteed by the testator, and the question is whether their judgment is right. The point which has been argued is whether any claim which the plaintiffs might have against the defendant in respect of a devastavit has been barred by the Statute of Limitations. The view which appears to have been taken by the judges in the Divisional Court may be stated in a few words. They seem to have thought that, because the claim of the plaintiffs upon the guarantee did not arise until the year 1903, the period of limitation for the purposes of the Statute of Limitations in this case must be calculated from that date, and, therefore, as six years had not elapsed since then, when the action was brought, the defence based on the Statute of Limitations failed. With great respect to them, I think that they have not sufficiently kept in view the true nature of the proceedings against the defendant. A great many points were raised and argued in the Divisional Court, and possibly the point with which we are now dealing became somewhat obscured.

The facts may be very briefly stated. In February, 1898, after payment of some small debts, the balance of the testators' estate, amounting to about 419*l.*, was handed over by the defendant to his co-executor, who was also the residuary legatee under the will; and it is not suggested that since then the defendant has had anything to do with the estate, or has had any of the

testator's assets in his hands. The testator having given a guarantee to the plaintiffs that payment of the premiums on certain policies of insurance should be kept up, in 1903 default was made in payment of the premiums on these policies, and the plaintiffs, having had in consequence to pay the same, claimed repayment of the amount thereof from the defendant as executor. I think it is necessary, in the first place, not for the purpose of dealing with the case on any mere question of form, but as matter of substance, to consider the nature of the original proceedings in the county court; and I agree with Kennedy J., as he then was, in thinking that it is unfortunate that there were no pleadings in this case, for, if there had been pleadings, I think the point might have been more conveniently raised. From the statement originally made in the plaint note and particulars, it appeared that the action was brought against the defendant as one of the executors of Edward Warmoll, deceased, "for 76*l.* 9*s.* 8*d.*, amount of premiums on policies on the life of Edward Henry Warmoll, and for which the deceased was liable under a guarantee." I do not think that it could be suggested that, under those particulars as originally framed, the plaintiffs would be entitled to claim against the executor in respect of what I may call any right of action founded upon his personal conduct or misconduct in dealing with the testator's estate. The defendant gave notice of special defences, namely, that he had fully administered all assets of the testator that had come to his hands, and that, if he had committed any devastavit with regard to the said assets, such devastavit was committed more than six years before the commencement of the action, and that he would rely on the Statute of Limitations as barring any such claim. It appears that he had before action received an intimation that the plaintiffs would allege that he had committed a devastavit. What happened upon the trial in the county court cannot be very clearly ascertained; but, as the result of what took place, it appears that the deputy county court judge gave the plaintiffs relief against the defendant on two grounds. First, he gave a judgment for the sum claimed against the defendant as executor, directing payment of the amount by a certain date, and, in default of payment, awarding

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execution against the assets of the testator, if any, in the defendant's hands. Against that part of the judgment there is no appeal. In the ordinary course of the old practice under a similar judgment in the Superior Courts, the question of a devastavit would not have arisen unless and until, upon the return to a fieri facias, the sheriff had returned nulla bona testatoris and a devastavit, or merely nulla bona testatoris, in which latter case the plaintiff could sue on the judgment against the defendant as executor, suggesting a devastavit.

In this case, however, the county court judge proceeded to order further relief against the defendant on a second ground. He adjudged that the defendant, being one of the executors of the said deceased, had made away with and wasted divers moneys to the amount of the sum for which judgment was given, which moneys were the property of the deceased, and came to the hands of the defendant as executor to be administered, and he ordered, after, in the first instance, awarding execution against the assets of the testator as before mentioned, that, if there should not be sufficient assets of the testator in the hands of the defendant to satisfy the amount of the judgment, then the amount should be levied of the proper goods and chattels of the defendant. The effect of that judgment is to give the plaintiffs an effective remedy against the defendant personally in respect of his conduct in committing a devastavit of the testator's assets.

The learned judges in the Divisional Court, as I have already said, gave effect to the argument that, inasmuch as the failure to pay the premiums on the policies of insurance did not take place till 1903, the fact that the devastavit, if any, had taken place more than six years before the commencement of the action was immaterial. It seems to me, with great respect to them, that, in so holding, they were losing sight of what is the foundation of the right of action in respect of a devastavit. The ground of complaint by the plaintiff against the defendant in such an action is the wrongful act of the defendant in wasting the assets. I do not think that for this purpose it matters how the question of the right to sue in respect of a devastavit arises. If, under the old procedure, upon the return by the sheriff of nulla

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bona testatoris to the writ of fieri facias, the plaintiff brought an action on the judgment suggesting a devastavit, that action would be founded on the wrongful conduct of the defendant; and, if that wrong had taken place more than six years before action, I think the authorities shew that the ordinary rule would apply, and the defendant would be entitled to take advantage of the Statute of Limitations. I should have come to that conclusion apart from authority, but I think the case is covered by authority. In *Thorne* v. *Kerr* (1) Page Wood V.-C., and in *In re Gale* (2) Bacon V.-C., decided that, where the action must be framed, and the plaintiff must rely, on a devastavit, and six years have elapsed, the Statute of Limitations applies. The law in that respect as laid down by those learned judges was distinctly recognized by Chitty J. in the case of *In re Hyatt.*(3) He said in giving judgment in that case: "Counsel have not been able to find, and I am satisfied they could not find, any instance of a defence at law put forward by an executor, sued simply as executor, setting up his own devastavit, and thereupon claiming the benefit of the Statute of Limitations. In these respects there is no difference between the liability of an executor at common law and in equity. Nor is there any difference where he is sued for a devastavit. If it is necessary that the demand against the executor should be framed on the principle of devastavit, or if the creditor, going out of his way, chooses to sue him in that form, there is no question that he can plead the Statute of Limitations against the devastavit so charged. The reason for this was well pointed out by Sir William Page Wood in the case of *Thorne* v. *Kerr* (1), and appears from all the authorities upon the subject when carefully considered. The creditor in such a case elects to treat the executor as his own debtor. If the

(1) 2 K. & J. 54. It will be observed that the reported judgment in this case contains, at p. 63, the statement that "at law, if an executor committed a devastavit, the remedy was by action of trespass against him." This is quite inconsistent with the authorities summed up in Williams on Executors as above cited, cp. 1 Wms. Saund. 246, and with what is said by Lord Alverstone C.J. It would appear that, if the learned Vice-Chancellor really made the statement ascribed to him, it must have escaped him per incuriam.—F.P.

(2) 22 Ch. D. 820.

(3) 38 Ch. D. 609, at p. 615.

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plaintiff chooses to say: 'It is not the estate of the debtor that is liable, but it is you, the executor, who are personally liable,' the executor, being then charged with his own personal wrong-doing or tort, is entitled to avail himself of the benefit of the Statute of Limitations." Again, further on he said: "*In re Gale* (1) I consider to be a case in which the demand against the executor appeared to the Vice-Chancellor to be put forward simply as founded on a devastavit. It is quite unnecessary to travel through the case. The Vice-Chancellor seems to me, if I may say so with respect, to have stated the law quite correctly when he expressed himself thus: 'Upon the authorities, and also upon the well-settled rule of law, if you sue upon a devastavit, that is personal against the executor, and is barred by the six years.'" It seems to me clear upon these authorities that the plaintiffs are not entitled to judgment in the county court against the defendant personally. The claim as originally framed being against him as executor only, in the absence of an amendment, such a judgment cannot be sustained; and even if, under the circumstances, the claim ought to be treated as amended in this respect, yet, inasmuch as the plaintiffs cannot recover against the defendant personally except upon the allegation of a devastavit, I think the Statute of Limitations would apply, and the claim would be barred.

It was contended that the Trustee Act, 1888, s. 8, sub-s. 1 (*b*), applied to this case. It is not necessary to say anything one way or the other as to this contention. A good deal may be said in favour of the view that some such protection as is afforded by that provision ought to be given to an executor. I am not entirely satisfied that an executor, merely as such, comes within the definition of a "trustee" given by the Act. I express no opinion, however, on this question. There is one other matter raised in this case, with regard to which Buckley L.J. has much more experience than myself, but I may say that I am not satisfied that in this action an account could be ordered to be taken as against the defendant as in an administration action, so as to give an effective remedy to the plaintiffs, inasmuch as the action is brought against one only of two executors. It

(1) 22 Ch. D. 820.

appears to me that the plaintiffs could only succeed in this action against the defendant personally by alleging a devastavit, and, as I have already said, I think the Statute of Limitations is a bar to any such claim. For these reasons I think the appeal must be allowed.

FLETCHER MOULTON L.J. read the following judgment:—In this case I am of opinion that the judgment in the county court which is appealed from cannot be supported, and that the appeal must be allowed.

The judgment is a judgment according to Form No. 238 of the County Court Rules, 1903, which by its title is expressed to be a "judgment against an executor who has wasted assets." That is a judgment which can be given only in respect of a plaint coming within Order xxx., rr. 3 and 4. The plaint in the present case was not of this character. It was a claim against the defendant as executor simply, and did not allege that he had wasted assets, and the only judgment that could be given in respect of it (so far as the amount claimed is concerned), was a judgment de bonis testatoris, and de bonis testatoris quando acciderint.

But I will assume in favour of the plaintiffs that at the trial the plaint was amended either by changing it into a plaint alleging a devastavit according to Order xxx., rr. 3 and 4, or by adding such a plaint. I do not think that this was in fact the case, and I am of opinion that the defendant might rely on the incorrect form of the judgment as a sufficient ground for our allowing the appeal. But this would only lead to increased costs, and, inasmuch as the parties are desirous that the substantial question should be decided on this appeal, I think it better to treat the case as though such an amendment had been made.

The effect of Order xxx., rr. 3 and 4, appears to me to be that, if a plaintiff in the county court wishes to obtain as against an executor relief on the ground that he has wasted the assets of the testator, he must sue upon a devastavit. If he does so, the case of *In re Hyatt* (1), among others, is an authority that the

(1) 38 Ch. D. 609.

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executor is entitled to set up the Statute of Limitations as a defence to such an action, inasmuch as it is an action against him personally on the ground of his own personal wrong-doing in wasting the assets of the testator. Here he has set up that defence, and the admitted facts are that the alleged devastavit took place in the year 1898, and consisted in his paying over the whole of the estate in his hands to his co-executor, who was also the residuary legatee. The action was not brought until late in the year 1905, so that the plea of the Statute of Limitations was established, and the judge ought to have given judgment for the defendant so far as the plaintiffs' claim rested on the alleged devastavit. The defendant has appealed only against so much of the judgment as relates to the devastavit, and therefore I am of opinion that his appeal must succeed, and should be allowed.

For the reasons I have given I think it unnecessary to decide the question whether by some other form of procedure the plaintiffs could have prevented the defendant from obtaining the benefit of the Statute of Limitations, a question which no doubt is raised by the remarks of Chitty J. in the above-mentioned case of *In re Hyatt.* (1) But I ought to add that, as at present advised, I am of opinion that (at all events since the passing of the Trustee Act, 1888) the liability of an executor in respect of moneys honestly paid away by him, as in this case, is barred at the expiry of six years from the date of the payment, whatever be the form of the proceedings by which it is sought to enforce the liability.

BUCKLEY L.J. In order to determine whether the judgment which the plaintiffs in this action have obtained is right or wrong, it is essential to understand exactly the nature of the action which they have brought. One Edward Warmoll on October 7, 1891, guaranteed to the plaintiffs, who are bankers, the payment of premiums on policies of insurance upon the life of Edward Henry Warmoll, one of his sons, who had obtained advances from the bank, and had given the policies by way of security for those advances. Edward Warmoll died in 1897. He by his will appointed as his executors the defendant and

(1) 38 Ch. D. 609.

William Frederick Warmoll, another son of the testator. They both proved the will. After payment of some debts of the testator, the defendant in February, 1898, handed over to his co-executor, who was residuary legatee, the balance of the estate. Payment of the premiums on the policies continued to be duly made by the testator's son William Frederick down to the year 1903, but on June 27, 1903, default was made in payment of a premium on one of the policies, and there were subsequent defaults. The bankers then brought this action against the defendant, not joining the other executor, but suing the defendant, as one of the executors, for the amount of the premiums payment of which the testator had guaranteed. The claim as stated in the plaint is "for 76*l.* 9*s.* 8*d.*, amount of premiums on policies on the life of Edward Henry Warmoll, and for which the deceased was liable under a guarantee." In that action, if the defendant admitted assets, which he did not, the plaintiffs could have got judgment against him; if he did not admit assets, they could get judgment de bonis testatoris, or out of assets quando acciderint. A third remedy would have been open to them, if they had appropriately framed their claim, namely, that, if the defendant had been guilty of a devastavit, they might, upon alleging that devastavit, have obtained a judgment against him de bonis propriis. One thing, however, they could not have done. They could not have obtained administration of the testator's estate, because they had only sued one of the executors. They were entitled to such remedy as they had against one executor, and nothing more. It is essential to bear in mind that in this action the plaintiffs could never have had administration. The plaintiffs have in fact obtained such a judgment as is obtainable in an action upon a claim which alleges a devastavit. The most favourable way in which the case can be treated for them is, I think, to treat it as if they had originally alleged a devastavit, and the defendant had set up in answer that the Statute of Limitations had run since the act of devastavit. In what I am about to say I propose to treat the action on that footing. In such an action the remedy claimed as against the defendant is one against him personally in respect of a wrong done by him to the plaintiffs, on the ground that there was as against the plaintiffs a

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wrongful application of assets which ought to have been otherwise applied. In this case the alleged improper application of assets took place in February, 1898. It seems to be perfectly plain both upon principle and authority (the authorities being the decision of Page Wood V.-C. in *Thorne* v. *Kerr* (1), and that of Bacon V.-C. in *In re Gale* (2)) that, if an act of devastavit has been committed, and six years have run, the Statute of Limitations applies, and a creditor is thereby precluded from setting up that act. To that the plaintiffs in the present case seek to make a reply which seems to me totally irrelevant. They admit that the defendant parted with the assets in 1898, but they say that down to June, 1903, the premiums upon these policies were duly paid, and therefore they could not have sued for anything. It is true that they could not have sued on the guarantee; but the cause of action in respect of the devastavit is not the debt which was incurred on the guarantee. It has nothing to do with it. The debt on the guarantee was the testator's debt: the remedy for the devastavit is against the executor personally. The act of devastavit is parting with the assets in February, 1898. That act was either wrongful to the persons who were then contingently entitled to payment of something out of the estate, or it was not. If it was not a wrong to them, there is no liability for a devastavit, because there was no wrong. On the other hand, if it was a wrong to them, when was that wrong committed? Obviously in February, 1898. It is immaterial to say that until 1903 no cause of action arose upon which an action could have been maintained on the guarantee. I pause, however, here to add a fact which is fatal to the plaintiffs' case, if I took a different view. It is that in June, 1903, which is within the statutory period (for the devastavit was in February, 1898), the plaintiffs could have sued on the guarantee, and could therefore at the time have set up the devastavit. But I do not rest my judgment on that consideration. It is, I think, immaterial.

As against *Thorne* v. *Kerr* (1) and *In re Gale* (2), the plaintiffs' counsel cited *In re Marsden* (3) and *In re Hyatt* (4), as if these cases affected in some way the doctrine laid down in the former

(1) 2 K. & J. 54.
(2) 22 Ch. D. 820.
(3) 26 Ch. D. 783.
(4) 38 Ch. D. 609.

cases. To my mind they do not affect it at all. There is nothing inconsistent with that doctrine in the proposition that, in an administration action, it is not competent for an executor to say that he parted with assets improperly more than six years ago, and that the Statute of Limitations has run against any claim. The answer is that in administration he cannot set up his own wrong in improperly dealing with assets, that, so far as he is not able to discharge himself, the assets must be treated as still in his hands. The remedy in administration is upon the footing that a fund has been so dealt with that the executor has not discharged himself of it, and is therefore still liable to account for it; he cannot say he has parted with it; whereas an action for a devastavit proceeds upon the footing that the executor has parted with the fund, and is liable because he has parted with it. I will only refer to one or two expressions in *In re Marsden* (1) and *In re Hyatt* (2) to shew that the result of these decisions is what I have stated. In the case of *In re Marsden* (1) the proceedings were by a mortgagee for the realization of his security, and by a legatee for administration. Kay J., as he then was, after referring to *Thorne* v. *Kerr* (3) and *In re Gale* (4), said, the question being one of account: "Therefore I must hold that these items of discharge while the debt was unpaid must be disallowed." That is to say, in administration he was saying that the executors had not discharged themselves of items which came to their hands. In the case of *In re Hyatt* (5) Chitty J. said: "Under this order the executor has brought in his account, in which he charges himself with the receipt of considerable sums of money." Then he says (6): "They contend that it is competent for an executor, when accounting under such an order as the present, first to set up his own devastavit, and upon such devastavit to raise the defence of the Statute of Limitations," and he proceeds to hold that an executor cannot do that. It is quite plain that he cannot. It is obvious that these considerations have no bearing at all in this case, because, as I have pointed out, in this action the plaintiffs cannot obtain

(1) 26 Ch. D. 783.
(2) 38 Ch. D. 609.
(3) 2 K. & J. 54.
(4) 22 Ch. D. 820.
(5) 38 Ch. D. 609, at p. 614.
(6) Ibid. at p. 615.

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administration. They have not brought the other executor before the Court. It may be, for aught we know, that he has received assets which are available, and the estate, if it were worked out, may be amply sufficient to satisfy the plaintiffs' claim. As to all that we know nothing at all. All that is alleged here is that one of two executors paid away assets improperly, with the result that he was personally liable. The answer to that is that, assuming that he did so, he did it more than six years ago, and the Statute of Limitations has run, and he is therefore not liable for a devastavit. For these reasons it seems to me that the judgment in the county court was wrong in so far as it proceeded on the footing that there had been a devastavit by the defendant, and that it ought to be amended by striking out that portion of it, as asked for by the notice of appeal to the Divisional Court.

Appeal allowed.

Solicitors for plaintiffs: *Maples, Teesdale & Co., for Ellen & Holt, Great Yarmouth.*

Solicitors for defendant: *Hartcup, Davis & Cobbold, for Hartcup & Son, Bungay.*

E. L.

[IN THE COURT OF APPEAL.]

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May 2.

CLARE *v.* JOSEPH.

Solicitor and Client—Agreement as to Costs—Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4.

An agreement by a solicitor with a client to charge him nothing for costs if he won his action, and, if he lost it, to charge only the same amount for costs as he would have recovered from the opposite party had the action been successful, is not an agreement which is required by s. 4 of the Attorneys and Solicitors Act, 1870, to be in writing.

Jennings v. *Johnson*, (1873) L. R. 8 C. P. 425, approved.

Decision of Divisional Court, [1906] 2 K. B. 592, reversed.

APPEAL from the judgment of a Divisional Court (Ridley and Darling JJ.) (1) upon an appeal from a decision of the judge of the Southwark County Court.

The action was brought to recover a sum of 14*l.* 0*s.* 4*d.*, money had and received by the defendant while acting as the plaintiff's solicitor, and retained by the defendant in discharge of costs alleged to be due to him in that capacity. The defendant had acted as the plaintiff's solicitor in two actions brought against persons respectively named Shepherd and Hawkins. In the action against Shepherd the terms on which the present defendant acted were contained in an agreement in writing as to costs, by which, in the event of the action being successful, he was to make no charge against the plaintiff for costs, but in the event of its being unsuccessful he was to receive from the plaintiff the same amount of costs that he would have recovered from the defendant if the action had been successful. No question arose between the parties respecting this agreement. In the subsequent action against Hawkins there was no agreement in writing as to costs, but it was alleged by the plaintiff, and was found as a fact by the jury at the trial of the present action in the county court, that the plaintiff and defendant entered into an oral agreement as to costs to the same effect as the written agreement in the action against Shepherd. In the action against Hawkins the plaintiff was successful, but the defendant, who

(1) [1906] 2 K. B. 592.

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denied that an oral agreement as to costs had been entered into, retained in his hands as costs the sum of 14*l.* 0*s.* 4*d.* out of the money recovered in that action; this sum the plaintiff now sued for. The defendant contended that under s. 4 of the Attorneys and Solicitors Act, 1870 (1), such an agreement as that relied on by the plaintiff must be in writing. The learned county court judge gave judgment for the plaintiff, and granted leave to appeal. On appeal to the Divisional Court his decision was reversed, but leave to appeal was given.

The plaintiff appealed.

J. A. Simon, for the plaintiff. It was not necessary, in order to bind the defendant, that the agreement should be in writing. When s. 4 is considered as a whole, it is plain that it was intended to prevent solicitors from setting up verbal bargains for remuneration at a different rate from the usual one. Looking at the precise point decided in *Jennings* v. *Johnson* (2), that decision concludes the present case; it is not distinguishable on the ground suggested in the judgment of the Divisional Court. In *Ibberson* v. *Neck* (3), which was not cited below, Huddleston B. followed *Jennings* v. *Johnson* (2), and it is obvious from his judgment that he thought it impossible for a solicitor to set up successfully as a defence the fact that such an agreement was not in writing. *In re Lewis, Ex parte Munro* (4), is merely a decision that an agreement must be signed by the client before he can be put under exceptional and disadvantageous terms as to the costs which he will have to pay his solicitor, and the dictum in that case of Lord Coleridge C.J. that the agreement must be signed by both parties was criticized by Thesiger L.J. in *Bewley* v.

(1) By 33 & 34 Vict. c. 28, s. 4: "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated. . . . ."

(2) L. R. 8 C. P. 425.

(3) (1886) 2 Times L. R. 427.

(4) (1876) 1 Q. B. D. 724.

Atkinson (1) as being unnecessarily wide, and was expressly disapproved by Pollock B. and Charles J. in *In re Thompson, Ex parte Baylis* (2), where it was held that the signature of the solicitor was unnecessary to a document which embodied the terms of an agreement as to the costs of an action which had been settled and which was signed by the client only.

It is true that s. 4 deals also with an agreement to charge costs at a less rate than the ordinary rate of remuneration, but it must be remembered that the Legislature was endeavouring to deal with all the possible cases in which a solicitor could set up the contention that his client had agreed to pay him something exceptional. The provision in that section that the amount payable under the agreement should not be paid until the agreement had been examined and allowed by a taxing officer would in practice only be wanted where the solicitor was charging more than the ordinary scale. Before 1870 a solicitor was obliged to send in his bill of costs a month before he could sue upon it, but he could shew the existence of a bargain entitling him to be paid upon a different scale, and could rely upon such a bargain even where it was merely verbal, subject, of course, to the control of the Court, which invariably looked to see whether the bargain was reasonable and fair to the client. The existence of such a bargain was always taken into account on taxation, although it was not necessarily enforced. The effect of s. 4 of the Act of 1870 was to enable the solicitor to set up the agreement provided it was in writing. [He also cited *Drax* v. *Scroope* (3); *In re Eyre*. (4)]

Ricardo, for the defendant. The Divisional Court was right in holding that under s. 4 the agreement could only be enforced if it was in writing. The statute was passed in order to prevent such disputes as the present from arising, and s. 4 was intended to be as much for the protection of the solicitor as of the client. That section makes provision for the taxing officer taking the opinion of the Court or a judge where he is of opinion that the agreement is "not fair and reasonable": those words are

(1) (1879) 13 Ch. D. 283.
(2) [1894] 1 Q. B. 462.
(3) (1831) 2 B. & Ad. 581; 1 Dowl. 69.
(4) (1847) 10 Beav. 569.

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absolutely uncontrolled, and the power is not confined to cases where the taxing officer thinks that the agreement is not fair and reasonable to the client; it applies equally to cases where he thinks it is not fair and reasonable to the solicitor. An agreement of this kind may be reviewed by the Court at the instance of the solicitor: *In re Owen, Ex parte Payton.* (1) The case of *Jennings* v. *Johnson* (2) was wrongly decided; in any event it is distinguishable, for it is plain that the Court omitted all notice of that part of s. 4 which authorizes the making of agreements to take less than the ordinary rate of remuneration.

J. A. Simon in reply.

LORD ALVERSTONE C.J. The question raised by this appeal is one of considerable difficulty, but I have come to the conclusion that the contention of the plaintiff is right. I should have had more hesitation in forming this opinion but for the fact that the learned judges in the Divisional Court, from whose decision we are differing, do not seem to have dealt with what seems to me to be the central point in the case, that is to say, the scheme of s. 4 of the Act of 1870, having regard to the law on the subject as it stood when that Act came into operation. We have had considerable discussion in this appeal as to the state of the law before 1870; in my opinion it is correctly stated in Cordery on Solicitors, 3rd ed. at p. 261. Agreements as to costs were often made before 1870, and, upon the application of the client, they were considered and examined by the Courts, and they were not infrequently held to be binding both on the solicitor and the client. The inquiry was always directed to the question whether the agreement was fair and reasonable, and an agreement by the solicitor to take less than the usual remuneration was not looked upon as unfair or unreasonable, but was held binding upon him. We must remember that that was the state of the law in 1870 when we are called upon to construe the Act of that year, an Act which was designed to provide fresh safeguards for the protection of the client and to give the solicitor certain rights which he did not previously possess, provided that he himself complied with the requirements of the Act. Instead

(1) (1885) 52 L. T. 628. (2) L. R. 8 C. P. 425.

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of saying that the solicitor might enter into an agreement as to costs which should, as before, be subject to review of the Court, it provided that he might enter into an agreement in writing as to his costs, and went on to enact that, if he did so, there should be a further safeguard for the protection of the client, who should be entitled to have the agreement examined by the taxing Master to see if it was fair and reasonable, and if that officer was of opinion that it was not fair and reasonable he could require the opinion of the Court or a judge upon the point. The section is an empowering section, and in my opinion it does not affect the position of a client who sets up an agreement as to costs with a solicitor.

It has been contended that it is difficult to place that construction upon s. 4, because it contemplates that an agreement may be made for payment "at a less rate"; and at one time I felt pressed with that argument; but when we look at the immediately preceding words, I think that the answer given on behalf of the plaintiff is sound. Those words are, "either by a gross sum, or by commission or percentage, or by salary or otherwise," and I think that the introduction of the words "or at a less rate" may be accounted for by the fact that the preceding words contemplate various methods of payment which would require to be considered with, and compared with, the ordinary rate of charges which would be allowed on taxation; in such a case it might well be that, although the comparison might shew that the charges worked out at a less rate than the ordinary rate, the taxing Master or the Court might come to the conclusion that the agreement was, owing to certain of its provisions, not fair and reasonable to the client, and therefore ought not to be enforced. Unless the introduction of the words "or at a less rate" negatives the construction which I have put upon the section, we ought not to attach undue importance to them; they were in my opinion inserted because the Legislature was dealing with the rate of remuneration and the mode of payment. Unless those words point to the necessity of a different construction, I think that we should be guided in our interpretation by the broad scheme of the Act of Parliament. The section starts by saying that a solicitor *may* make an

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agreement in writing with his client, and this seems simply to empower a solicitor to make an agreement which will bind his client if certain conditions are complied with. It has been argued that the meaning of the section is that no agreement as to remuneration between solicitor and client is binding unless it is in writing. But if the Legislature had been considering the question from the point of view of affording protection to the solicitor, it would have used words importing that an agreement in writing might be made between a solicitor and his client, and not merely words which say that a solicitor may make an agreement in writing. The scheme of the section is that it empowers a solicitor to enter into such an agreement with his client, and this he might indeed have done before the Act, and occasionally he might have been able to enforce it; when this agreement has received the client's signature it comes within the machinery provided in the later part of the Act. In my view the section made it necessary that an agreement should be in writing if it bound the client to pay the solicitor on a different scale of remuneration from the ordinary scale.

The Divisional Court took a contrary view, and Darling J., laying great stress on the language as to an agreement for remuneration at a less rate than the solicitor would otherwise be entitled to, said that the section was intended to deal with the rights both of the solicitor and of the client and to put them both in the same position, and that it applied to agreements set up by the client as well as to agreements set up by the solicitor. But I do not think that the learned judge directed his attention to the scheme of the section, as I have already described it—that is, that the section empowers a solicitor to enter into agreements of this nature; and his judgment does not answer the point that if the Legislature had intended that any agreement of this nature must be in writing the section would have been differently framed. It is, I think, clear that *Jennings* v. *Johnson* (1) is an authority in favour of the view which I am expressing, and I am unable to agree with the distinction drawn in the Divisional Court between that case and the present,

(1) L. R. 8 C. P. 425.

namely, that, although an agreement by a solicitor to take nothing for costs was not within the Act, an agreement to take less than the ordinary rate of costs would be within it. *Jennings* v. *Johnson* (1) was decided by a Court of very great authority, and, although the judgment of Bovill C.J. is no doubt open to the criticism that it is incomplete, inasmuch as it takes no notice of the provision of s. 4 which authorizes a solicitor to agree to take less than the ordinary rate of charges, it must be remembered that the case was decided not long after the Act of 1870 came into operation, and at a time when both the provisions of the Act and the previous practice were fresh in the recollection of the Court. The reasoning of that case applies to the present. The Act of 1870 was, in my opinion, intended to place beyond all question the right of a solicitor to make these bargains subject to the control of the Act, and its language is not sufficient to enable us to say that a verbal contract by a solicitor such as we have before us cannot be enforced by the client. For these reasons I think that the appeal must be allowed.

FLETCHER MOULTON L.J. This action was brought to recover moneys received by a solicitor to the use of his client, the solicitor having retained them to meet a claim made by him against his client for costs in an action which he had conducted on his behalf; and in his reply the client sets up an agreement made by the solicitor to do the work on terms amounting to less than the costs to which he would in the ordinary course have been entitled. The solicitor traversed the existence of any such agreement, but the jury found that a verbal agreement to that effect had in fact been made, and the only way in which the solicitor can avoid judgment against him is to contend that the agreement is not one to which the law will give effect. This contention is based on s. 4 of the Attorneys and Solicitors Act, 1870. That section is the opening section of Part I. of the Act, which extends to s. 15 (inclusive), and has often been the subject of discussion in the Courts. It commences thus: "An attorney or solicitor may make an agreement in writing with his client

(1) L. R. 8 C. P. 425.

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respecting the amount and manner of payment for the whole or any part of past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor." It is contended for the solicitor that this part of the section prohibits or renders unenforceable verbal agreements affecting his remuneration, all agreements as to which must be in writing.

It is to be remarked in the first place that this is a purely enabling, and not a disabling, section, and the Court would not, unless forced to do so, construe such a section so as to take away or alter powers already in existence, except indeed by extending them. Let us now consider the state of the law on this subject at the date of the coming into operation of the Act of 1870. At that date agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were, however, viewed with great jealousy by the Courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the Courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense. But when it appeared that the agreement was favourable to the client, the Courts often held the solicitor to his bargain, for there was no ground in equity why they should be suspicious of a bargain of that kind. Sect. 4, therefore, was not required for the purpose of enabling persons to enter into these agreements, nor was it required in order to strengthen the hands of the Courts in their examination of them. Before 1870 the Court had full power to investigate their propriety, and in my opinion the specific provisions of s. 4 did no more than provide and regulate a procedure for the control of such agreements; they did not in substance alter the law affecting them.

I felt for some time a difficulty in understanding the language of s. 4 on the supposition that, as the law stood prior to the Act,

verbal agreements were enforceable when they were favourable to the client and might even be enforced when favourable to the solicitor if the Court were satisfied that they were fairly made. I felt that s. 4 was intended to hold the balance equally between the solicitor and the client, and that an agreement by the solicitor to do the work for a less sum than the ordinary remuneration is as much within the words of the section as one that provides for his remuneration at a higher rate. If, therefore, writing is necessary in favour of the solicitor, why is it not necessary in favour of the client? But the difficulty arises solely from concentrating one's attention too much on s. 4, which is only the introductory section of a whole group of sections forming Part I. of the Act. That group concludes with a section of great importance (s. 15), which provides that where an agreement has been made in accordance with s. 4, and has not been set aside, the ordinary provisions as to delivery and taxation of a duly signed bill of costs are no longer to have effect. This gives to a solicitor who comes under this group of sections an advantage not previously given to him. In my opinion s. 4 only prescribes the mode in which the solicitor can obtain for himself (and I think also in which the client can obtain for himself) the benefit of the group of sections from s. 4 to s. 15. If either the solicitor or client wants the privileges which those sections give him, he must comply with the requirements of s. 4 and must have an agreement in writing, but if he does not want the benefit of those sections, s. 4 imposes no duty upon him. It is only those who wish to come under those sections who must take the steps prescribed by s. 4. The plaintiff in this action is seeking no benefits under these sections; his position is that the defendant agreed to do certain work for him for less than the ordinary remuneration, and that he is keeping him to his bargain. Before 1870 the law would have held the defendant to his agreement: these sections do not affect his status, nor does he invoke their assistance; he is precisely where he would have been if they had never been passed; therefore the Court must refuse, as it always would have refused, to interfere in favour of the defendant.

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BUCKLEY L.J. I agree. The jury has found as a fact that the defendant verbally agreed with the plaintiff that, in the event which has happened, he would make no charge against the plaintiff for his costs. In order to succeed in this action, the defendant must shew that under the Act of 1870 he is not bound by his bargain. The law in existence when the Act of 1870 was passed is clear; the solicitor could not charge his client more than the amount of his bill of costs when taxed, and it was his duty to advise his client that it was contrary to his interest to pay more. Further, if there were an agreement between them by which the client was to pay less, the solicitor, being in a fiduciary relationship to him, owed the duty of advising him that he ought not to enter into such an agreement if other provisions in it were contrary to the client's interest. The solicitor was under these disabilities when bargaining with his own client, because it was his duty to guard him from acting in a way prejudicial to his interest. Then came the Act of 1870. Its effect is as if it recited that the solicitor was under these disabilities, and then enacted that, notwithstanding such disabilities, he might make an agreement in writing with his client as to his remuneration, provided he complied with the requirements of the Act. The Act, when complied with, relieved the solicitor of his disability. After the operative words of s. 4 come provisions by which certain benefits are reserved to the client, such as the provision that in certain cases the taxing officer must be satisfied that the agreement is fair and reasonable, and must examine and allow it before it can be put in force. The later provisions of the section in short cut down the benefits given in the earlier part to the solicitor. It is said that before the Act of 1870 an agreement to take remuneration at a rate less than that to which he would otherwise have been entitled was binding upon a solicitor. Of course, as a rule, such an agreement would be in the client's favour, but it might contain other provisions which would render it on the whole to his detriment. The effect of s. 4 is, I think, that, whether the solicitor is to have remuneration at a greater or a less rate than the ordinary rate, an agreement between him and his client to that effect must be in writing, if the solicitor sets it up. If the

client is setting it up, none of the considerations with which I have been dealing have any bearing. Before the Act of 1870 the solicitor was bound by such an agreement as the present one; that Act was wanted, not for the protection of the client, but for the benefit of the solicitor, in order to relieve him of the disability with which he was affected. Sect. 4 does not empower the client to do anything which he could not do before, but does empower the solicitor, provided he complies with the conditions imposed, to enter into a contract with his client which, prior to that statute, he could not have entered into. The solicitor here, as the jury found, has entered into a verbal agreement to take remuneration at a less rate than he would otherwise have been entitled to charge, and he cannot, I think, set up the defence that the agreement is not binding upon him because it is not in writing. I think, therefore, that the appeal should be allowed and the judgment of the county court judge restored.

Appeal allowed.

Solicitors for plaintiff: *Hicklin, Washington & Pasmore.*
Solicitor for defendant: *Hyam Joseph.*

W. J. B.

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April 25.

THE KING *v.* WILKINS.

Justices—Jurisdiction—Threatened Breach of the Peace—No formal Charge—Power to bind over—Form of Order—No Averment as to going in Bodily Fear.

On the hearing by justices of a summons against a defendant for threatening to assault the complainant, the defendant alleged that the complainant had used threatening language towards him, but he made no formal charge against the complainant. The justices, after hearing the evidence of the complainant and the defendant, found as a fact that there was a real danger of a breach of the peace on the part of both parties, and they ordered both of them to be bound over to be of good behaviour. The order made against the complainant, as drawn up, contained no averment that the defendant went in bodily fear of the complainant:—

Held, that the justices had, in the circumstances, power to order the complainant to be bound over, and that the absence from the order of an averment that the defendant went in bodily fear of the complainant did not render it bad on its face.

Rule nisi for a certiorari to quash an order of justices for the county of Carmarthen.

It appeared from an affidavit filed by the justices that a complaint had been made to the justices by one John that one Williams had on several occasions threatened or attempted to assault him, and a summons was thereupon issued calling upon Williams to appear and shew cause why he should not be ordered to give a surety of the peace.

At the hearing and adjourned hearing of the summons evidence having been given in support of the complaint, Williams stated that John had used bad language towards him and had threatened him and had challenged him to fight, but Williams did not state that he went in bodily fear of John. John admitted in cross-examination that he had written a letter to Williams, which letter, in the opinion of the justices, was couched in most violent and slanderous terms.

No cross summons against John was issued or applied for, but the justices found as a fact that there was a real danger of a breach of the peace on the part of both Williams and John, and they bound both parties over to be of good behaviour and to

keep the peace. John was represented at the hearing by a solicitor, and the recognizance was entered into by John without any protest or objection by him or his solicitor.

The order against John was in the following terms: "William John of Tellisford Villa in the parish of Burry-Port Urban in the said county having made a complaint that Evan Williams of Tyconol in the parish of Pembrey in the said county (hereinafter called the defendant) on the 29th day of September, 1906, at the parish of Pembrey in the county aforesaid unlawfully did use divers threats towards the said William John whereby he feared he would do him some bodily injury against the peace of our lord the King, his crown and dignity; and whereas upon the hearing of the complaint this day before us the defendant stated upon oath to us in the presence and hearing of the said William John that the said William John at the time and place aforesaid and upon divers other occasions unlawfully did use divers threats towards him the defendant calculated to provoke a breach of the peace; it is adjudged that the said William John do forthwith to the satisfaction of the Court enter into a recognizance to the sum of ten pounds to keep the peace and be of good behaviour towards His Majesty and all his liege people and especially towards the defendant for the term of six months next ensuing."

The rule nisi was obtained on the grounds that the order was bad because no formal complaint or charge had been made against John, and because the order did not state that Williams went in bodily fear of John.

Avory, K.C., and *Curtis Bennett*, for the justices, shewed cause against the rule. The justices came to the conclusion, after hearing the evidence of both parties, that there was a real danger of a breach of the peace. In these circumstances they had jurisdiction to order John to enter into a recognizance to keep the peace, although no formal charge by way of cross-summons or otherwise had been made against him. The justices possess this jurisdiction under the general powers derived from their commission. "Process is not essential to the jurisdiction of the justices to hear and adjudicate": *Reg.* v.

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Hughes (1), per Hawkins J. In *Ex parte Davis* (2) a man was charged with assault; the justices dismissed the charge, but nevertheless ordered him to enter into a recognizance to keep the peace; and it was held that they had power to do so, Blackburn J. stating that "it does not appear to be necessary for any information to be laid before the recognizances are ordered, if the party is already before the justices," and that "a binding of the party is a precautionary measure to prevent a future crime, and is not by way of punishment for something past." It is also suggested that the order made against John is bad in form because it does not state that Williams went in bodily fear of John. That is not an essential averment, but is merely a relic of the old procedure where one person could on an ex parte application to the justices get another person bound over, for which purpose the complainant had to swear that he went in bodily fear of the person whom he desired to have bound over.

David Rhys, for Williams.

Grimwood Mears, for John, in support of the rule. The justices had no jurisdiction to order John to be bound over. He appeared before them solely in the capacity of complainant to support his summons against Williams; no doubt he was in that capacity liable to be cross-examined as to the relations which had existed between him and Williams, but no charge was made against him, and he was convicted without having had an opportunity of being heard in his own defence. The cases cited have no application to the circumstances of this case. In *Reg.* v. *Hughes* (1) the man whose case was tried by the justices had been brought before them on a warrant illegally issued, and the only point really decided by the case was that that fact did not prevent a witness, who had sworn falsely before the justices, from being convicted for perjury. In *Ex parte Davis* (2) the person bound over was not the complainant, but the defendant, and the observations of Blackburn J. must have been intended to apply only to the case of a defendant. [He also referred to *Reg.* v. *Groves* (3) and *Andrews* v. *Mitchell.* (4)] Secondly, the order is bad on its face.

(1) (1879) 4 Q. B. D. 614, at p. 625.
(2) (1871) 35 J. P. 551.
(3) (1863) 8 L. T. 311.
(4) [1905] A. C. 78.

The averment that the complainant goes in fear of bodily harm is an essential part of an order of this kind, for the jurisdiction of the justices to order a person to be bound over to keep the peace only arises when it is proved that the complainant does go in bodily fear of the defendant: Hawkins' Pleas of the Crown, c. 60, s. 6; *Rex* v. *Stanhope*. (1) In *Phillips* v. *Justices of Gateshead* (2), cited in Stone's Justices' Manual, 39th ed. at p. 1059, Lord Coleridge C.J. said that a condition precedent to the granting of an order binding a man over to be of good behaviour "was an oath by the applicant that he went in bodily fear."

Avory, K.C., referred to *Rex* v. *Tregarthen* (3) and Burn's Justice, 30th ed. vol. 5, p. 743.

LORD ALVERSTONE C.J. I am of opinion that this rule must be discharged. The facts are that John, on whose behalf the rule was moved for and granted, had taken proceedings before the justices to have Williams bound over to keep the peace towards him. On the hearing of that application John was cross-examined by the solicitor who appeared on behalf of Williams, and it was proved to the satisfaction of the justices, as appears from their affidavit, that John had a short time previously and on more than one occasion used very violent language towards Williams and that there was a considerable amount of ill-feeling between them. The justices thereupon ordered both parties to be bound over to keep the peace.

It is contended on behalf of John that the order so far as regards him is bad. It is said in the first place that the justices had no power to order him to be bound over, because no formal charge, and, indeed, no charge of any kind, had been made against him. In my opinion, when a person appears before justices, although his appearance is in the capacity of complainant, and facts are proved to the satisfaction of the justices which would justify them in binding him over to keep the peace, the justices have jurisdiction to make an order to that effect, although no formal proceedings by way of information or otherwise have been instituted against the person. Justices have a

(1) (1826) 12 A. & E. 620, n. (2) (1879) Times Newspaper, July 15.
(3) (1833) 5 B. & Ad. 678.

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general power under their commission to bind over any person if it appears that that person has been guilty of violent conduct tending to a breach of peace, even though there is no proof of a threat towards any particular person, provided, of course, that the person bound over has had a reasonable opportunity of knowing the nature of the charge brought against him and of making his answer to it. Therefore, the first objection raised to this order appears to me to be without foundation.

Next, it is said that John had had no opportunity of being heard. I had at first some doubt as to whether this was not the case, but the justices' affidavit makes it clear that John's solicitor knew perfectly well what was being done, and the recognizance was entered into without any protest or objection on his part. Moreover, the rule nisi was not obtained on this ground.

Lastly, it is contended that the order is bad on its face because it does not state in terms that Williams went in bodily fear of John. I do not wish to lay down too general a rule, but my present impression is that it is only necessary to allege that the person goes in fear when an ex parte application is made for an order that one person should be bound over to keep the peace towards another. I should hesitate before holding that the order was in this case rendered bad by the absence of that allegation, if I was satisfied, as I am in this case, that the justices had materials before them to justify the order which they made against John. In my opinion the justices acted within their jurisdiction, and there is no ground for saying that the order is bad.

DARLING and PHILLIMORE JJ. concurred.

Rule discharged.

Solicitor for justices: *J. B. Somerville, for W. W. Brodie, Llanelly.*

Solicitors for Williams: *Crowders, Vizard & Co., for W. Howell, Llanelly.*

Solicitors for John: *Speechly, Mumford & Craig, for J. Lewis Phillips, Llanelly.*

F. O. R.

SMITH *v.* GREENWOOD.

1907

April 29.

Local Government—Local Authority—Power to order Substitution of Water-closets for existing Privies—Bradford Improvement Act, 1873 (36 & 37 *Vict. c. clxvii.*), *s.* 21.

A local Act provided that the corporation of the borough might "in any case where a dwelling-house within the borough shall be without a privy, water-closet or earth-closet, or an ashpit, or without a privy, water-closet or earth-closet or an ashpit of a construction and size approved by the corporation, require the owner of such house by notice under the hand of the mayor or town clerk for the time being to provide such a privy water-closet or earth-closet or such an ashpit, or to make such reparation or alteration of the existing privy water-closet or earth-closet or ashpit as in such notice shall be stated":—

Held, that under that provision the corporation were entitled to require the owner of houses, which were already provided with privies, to substitute water-closets for the privies, although the privies, as such, were of good construction and sufficient for the needs of the houses.

Held, also, that they were entitled to require the provision of a separate water-closet for each house.

Case stated by the stipendiary magistrate of Bradford.

The appellants, as being the owners of seven dwelling-houses in Southfield Lane, in the city of Bradford, were summoned under s. 21 of the Bradford Improvement Act, 1873 (1), for neglecting to provide water-closets and ashpits for the said houses pursuant to a notice in that behalf.

At the hearing the following facts were admitted or proved:—

The dwelling-houses were cottages, and were without privies,

(1) By s. 21 of the Bradford Improvement Act, 1873 (36 & 37 Vict. c. clxvii.): "In addition to all powers vested in the corporation, the corporation may, in any case where a dwelling house within the borough shall be without a privy, water closet, or earth closet, or an ashpit, or without a privy, water closet, or earth closet, or an ashpit of a construction and size approved by the corporation, require the owner of such house, by notice under the hand of the mayor or town clerk for the time being, to provide such a privy, water closet, or earth closet, or such an ashpit, or to make such reparation or alteration of the existing privy, water closet, or earth closet, or ashpit as in such notice shall be stated, and within a period therein mentioned; if such owner shall neglect to comply with such notice within the time therein appointed, he shall for every such offence forfeit a sum not exceeding five pounds, and a further penalty not exceeding the like sum for every day during which such offence shall continue."

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water-closets or earth-closets, or ashpits, of a construction and size approved by the corporation of the city. At the date of the information there were three privies and two ashpits for the seven houses, and both the privies and the ashpits were of good construction, and (apart from the question of the right of the corporation to insist upon water-closets) were sufficient for the accommodation of the said houses.

On June 30, 1906, a notice, of which the following is a copy, was served on the appellants :—

"To Messrs. Smith and Gotthardt the owners of the dwelling-houses situate at 273, 275, 277, 279, 279A, 281, and 283, Southfield Lane in the city of Bradford.

"Whereas it is provided by the Bradford Improvement Act, 1873, that the mayor aldermen and citizens of the said city, herein called the corporation, may in any case where a dwelling-house within the said city shall be without a privy water-closet or earth-closet or an ashpit, or without a privy water-closet or earth-closet or an ashpit of a construction and size approved by the corporation, require the owner of such house to provide such a privy water-closet or earth-closet or such an ashpit, or to make such reparation or alteration of the existing privy water-closet or earth-closet or ashpit as in such notice shall be stated and within a period to be therein mentioned And whereas the said dwelling-houses are without privies water-closets or earth-closets and ashpits of a construction and size approved by the corporation Now therefore the corporation in pursuance of the said Act do hereby require you within one calendar month from the service hereof upon you to provide for each of the said dwelling-houses a water-closet and an ashpit in the manner and form as shewn on the specification and detail drawing herewith.

"And notice is hereby further given that if you should neglect to comply with this notice you will be liable to a penalty not exceeding five pounds and a further penalty not exceeding five pounds for every day during which your default shall continue.

"(Signed) F. Stevens, Town Clerk."

Annexed to the notice was a printed form of specification, with

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a printed detail drawing shewing block plans, sections and elevations.

The appellants neglected to comply with the notice. It was contended on behalf of the appellants that the notice was ultra vires, in that it required the substitution of water-closets for existing privies, and also in that it required the construction of a separate water-closet for each house. The magistrate overruled the contention, and convicted the appellants subject to a case for the opinion of the Court.

Compston, for the appellants. The notice was ultra vires. The corporation have no power to order the substitution of a water-closet for an existing privy, at all events if the existing privy is sufficient for the accommodation of the house. The words of the section are to be read distributively. If the house is without a closet of any kind, the corporation may no doubt order whichever of the three classes of closet they choose. But if there is a privy already in existence on the premises, all that they can do is to require such an alteration of its size or construction as will still leave it a privy. It has, indeed, been held under s. 36 of the Public Health Act, 1875, which provides that if a house appears to the local authority "to be without a sufficient water-closet earth-closet or privy" they may require the owner "to provide a sufficient water-closet earth-closet or privy . . . . or either of them as the case may require," that where a house had an existing privy which was insufficient the local authority might require a sufficient water-closet to be provided in place of the privy: *Nicholl* v. *Epping Urban Council*. (1) But here the magistrate finds that the existing privies are sufficient. Further, the notice was bad in that it required a separate closet to be provided for each house. In *Guardians of Clutton* v. *Pointing* (2) it was held under s. 35 of the Public Health Act, which makes it a penal offence to build a new house without a sufficient water-closet, earth-closet, or privy, that it was not an offence against the section to build two cottages with one privy which was sufficient for the use of both.

Scarlett, for the respondent. The question of the power of the

(1) [1899] 1 Ch. 844. (2) (1879) 4 Q. B. D. 340.

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corporation to order the substitution of water-closets for existing privies is concluded by *Agnew* v. *Manchester Corporation.* (1) There a local Act passed in 1867 provided that the corporation might in any case in which a dwelling-house was "without an ashpit, or without an ashpit of a construction and size approved by the corporation, order the owner of such house to provide such an ashpit or to make such alteration, reparation, or enlargement of the existing ashpit as in the opinion of the corporation the circumstances of the case may require." And by subsequent amending Acts the term "ashpit" was to be held to include a "privy" and "any water or other closet for the reception of fæcal matter." So that the Act as amended was practically in the same terms as the Bradford Act. The appellant had upon his premises existing privies, and there was no evidence that they were insufficient as privies. It was held that the corporation had power under their Act to order the appellant to substitute water-closets for the existing privies. On the question whether the corporation here had power to require a separate water-closet for each house, the case relied on by the appellants, *Guardians of Clutton* v. *Pointing* (2), is not in point. That case turned upon s. 35 of the Public Health Act, whereas the section of that Act which corresponds to s. 21 of the Bradford Act is s. 36. And Cockburn C.J., who distinguished the two sections, suggested that under the latter there might be power to order a separate closet for each house.

Compston, in reply. The distinction which Cockburn C.J. there drew between the two sections turned upon the fact that s. 35 was a penal section and ought to be construed strictly in favour of the defendant, whereas s. 36 contained no penalty at all, but merely provided that, in the event of the owner not complying with the notice, the local authority might do the work themselves. But here s. 21 of the Bradford Act does contain a penalty for non-compliance. It therefore corresponds with s. 35, not with s. 36, and the reasoning of *Guardians of Clutton* v. *Pointing* (2) applies.

LORD ALVERSTONE C.J. I am of opinion that this appeal must be dismissed. The case is practically covered by

(1) (1903) 67 J. P. 174.

(2) 4 Q. B. D. 340.

authority. The section which we are called upon to construe provides that, "In addition to all powers vested in the corporation, the corporation may, in any case where a dwelling-house within the borough shall be without a privy water-closet or earth-closet or an ashpit, or without a privy water-closet or earth-closet or an ashpit of a construction and size approved by the corporation, require the owner of such house by notice under the hand of the mayor or town clerk for the time being to provide such a privy water-closet or earth-closet, or such an ash-pit, or to make such reparation or alteration of the existing privy water-closet or earth-closet or ashpit as in such notice shall be stated," and further provides that if the owner neglects to comply with the notice he shall be liable to a penalty. Now, that being a penal section, it is quite true that we ought to construe it strictly. But, on the other hand, when one looks at the object of the legislation, one cannot avoid the conclusion that it is a section to which ought to be given, in the interests of the public, as liberal a construction as the language is reasonably capable of bearing. Mr. Compston contended that the words of the section are to be construed distributively, that the power of the corporation to require the construction of a water-closet is confined to a case in which there is neither privy, water-closet, nor earth-closet upon the premises, and that where there is an existing privy they can only call upon the owner to repair it or alter it in a manner and to an extent which does not involve the substitution of a convenience of a wholly different kind. In my opinion that contention is unsound. The intention was to give to the corporation full control in the matter of these sanitary conveniences. In *Agnew* v. *Manchester Corporation* (1), where the language of the local Act, as amended by certain subsequent Acts, was in substantially identical terms with that of the present Act, we held that the corporation had power to require the substitution of water-closets for privies. That decision we are bound to follow. The distinction between the section before us and s. 36 of the Public Health Act, 1875, is that under the latter all that the local authority can require is that the

(1) 67 J. P. 174.

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particular convenience provided by the owner shall be sufficient, but, subject to the requirement that it must be sufficient, it is left to the owner to select which of the several kinds of convenience, privies, water-closets or earth-closets, he will adopt. The appeal must be dismissed.

DARLING J. I am of the same opinion.

PHILLIMORE J. I agree.

Appeal dismissed.

Solicitors for appellants: *Jaques & Co., for Neill & Holland, Bradford.*

Solicitors for respondent: *Cann & Son, for Stevens, Town Clerk, Bradford.*

J. F. C.

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June 3.

WOOD *v.* EALING TENANTS, LIMITED.

Local Government—Sewer passing through Private Ground—Drain—Right to connect—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 21.

The plaintiff was the owner of a house and garden adjoining a passage which was the property of the defendants. Beneath the surface of the passage was a pipe which, by reason of the fact that it received the drainage of more than one building, was a sewer within the meaning of the Public Health Act, 1875. The plaintiff, for the purpose of draining his house, carried a pipe through his garden, and the local authority, at his request, placed a pipe in the soil of the passage to connect the plaintiff's drain with the sewer. The defendants removed the connecting pipe from the passage, and the plaintiff sued them for trespass in so doing:—

Held, that, although the plaintiff was entitled under s. 21 of the Public Health Act, 1875, to connect his drains with the sewers of the local authority, neither the plaintiff nor the local authority had any right to place the connecting pipe in the defendants' land, and that the action, therefore, failed.

APPEAL of the plaintiff from a decision of the judge of the Brentford County Court.

The action was brought to recover damages for trespass. The facts were as follows: In 1904 the plaintiff purchased a plot of

ground at Ealing, and caused a house, with a garden in the rear, to be built thereon. The bottom of the garden was separated by a wall from a private passage which was the property of the defendants. In the soil of this passage, at a distance of about one foot from the wall, was a pipe which received the drainage of a number of houses belonging to the defendants, and it was admitted that by reason of this fact the pipe was a sewer within the meaning of the Public Health Act, 1875.

The plaintiff submitted plans of the proposed drainage system of his house to the local authority shewing that it was intended to drain the house by means of a pipe passing from the house down to the bottom of the garden, and thence into the sewer in the defendants' passage. The plans were approved by the local authority, and the pipe was laid in the soil of the garden as far as the wall, and the plaintiff then requested the local authority to carry out the work of connecting the pipe with the sewer in the passage; but the plaintiff did not give the local authority any formal notice under s. 21 of the Public Health Act, 1875. (1) The workmen of the local authority made the connection by means of a pipe about one foot in length, which was laid in the soil of the passage, and the plaintiff paid to the local authority their charges for so doing. The defendants subsequently after notice removed this connecting pipe, contending that its presence in their land constituted a trespass. This removal of the connecting pipe by the defendants was the alleged trespass in respect of which the plaintiff brought this action.

The county court judge, at the conclusion of the plaintiff's case, gave judgment for the defendants on the ground that it

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 21: "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications."

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had not been proved that the connection of the plaintiff's pipe with the sewer had been made under s. 21 of the Public Health Act, 1875, and that, even if that had been proved, neither s. 21 nor any other provision of the Act justified a trespass on the defendants' land.

The plaintiff appealed.

Turrell, for the plaintiff. It is not disputed by the defendants that the pipe in their land with which the plaintiff's drain has been connected is a sewer, and that it is, therefore, vested in the local authority: *Travis* v. *Uttley* (1); and the obligation to keep it in repair is cast upon the local authority, and that obligation carries with it the correlative right to connect with it the drains of such other houses as the authority think fit. Sect. 21 of the Public Health Act, 1875, provides that the owner of any premises within the district of a local authority shall be entitled to cause his drains to empty into sewers of that authority on giving the requisite notice and complying with the regulations of the authority. The evidence in the present case shewed that the provisions of that section had been complied with, and the plaintiff was, therefore, entitled to connect his drain with the sewer in the defendants' land, and for that purpose to lay the small piece of pipe in the defendants' land. For the purposes of s. 21 there is no distinction between a sewer which has become a sewer because it receives the drainage of more than one building and a sewer which has been made or acquired by the local authority in the ordinary course: *Wilkinson* v. *Llandaff and Dinas Powis Rural District Council*, per Stirling L.J. (2)

[DARLING J. Assuming that there has been a trespass, ought not the action to have been brought by the local authority?]

The piece of pipe interfered with was outside the plaintiff's land, but it was his property. [He also referred to *Russell* v. *Knight*. (3)]

Hinde, for the defendant, was not called upon to argue.

DARLING J. I am of opinion that this appeal fails. The defendants were the owners of some houses adjoining a

(1) [1894] 1 Q. B. 233. (2) [1903] 2 Ch. 695, at p. 703.
(3) (1894) Times Newspaper, May 9.

passage which was a private way and the property of the defendants. A pipe had, at some time or other, been laid beneath the surface of that passage, and into that pipe the defendants' houses drained. The effect of that was to convert the pipe into a sewer, and being a sewer, it became vested in the local authority, though the land in which it was laid remained the property of the defendants. As the pipe was a sewer vested in the local authority, the authority came under an obligation to keep it in repair, and that obligation carried with it a right in the local authority to enter upon the defendants' land for the purpose of executing repairs. On the other side of this passage there was a house belonging to the plaintiff, and for the purpose of draining his house he caused a drain to be constructed which passed through his land down to the wall which divided his land from the passage. The plaintiff then gave notice to the local authority of his intention to connect the drain of his house with the sewer, which, as I have said, was in the defendants' land and drained their houses. Sect. 21 of the Public Health Act, 1875, provides that the owner or occupier of any premises shall be entitled to cause his drains to empty into the sewers of the local authority, on condition of his giving the requisite notice of his intention, and of complying with the regulations of the authority as to the mode in which the communications between the drains and sewers are to be made. Therefore, it is perfectly true to say that the owner of premises within the district of a local authority has the right to connect his drains with the sewers of the local authority. But there are different kinds of sewers. There are sewers which have been made by the local authority, and if they are laid in private property, due compensation has to be paid to the owner of the land for any damage which he may suffer.

In the present case the local authority on the request of the plaintiff entered on the defendants' land and laid a pipe in it for the purpose of connecting the plaintiff's drains with the pipe in the defendants' land which was in point of law a sewer, but which had become so not because the local authority had themselves laid it in the defendants' land and paid compensation for doing so, but by reason of the curious doctrine that if two or more buildings drain into the same pipe, it thereby becomes a

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Darling J.

sewer. The mere fact that this pipe in the defendants' land was, for this reason, a sewer, does not, in my opinion, give the plaintiff or the local authority the right to enter on the defendants' land and put a pipe in it for the purpose of connecting the plaintiff's drain with this sewer. In order to make the connection there was necessarily taken from the defendants so much of their land as was occupied by the connecting pipe, and it was taken from them without any compensation being paid to them for it; whereas if the local authority had been desirous of using the defendants' land for the purpose of their sewers, they would have been compelled to pay compensation to the defendants for any damage which might thereby be caused. In this particular case it was only necessary for a very small piece of the defendants' land to be taken, because the sewer happened to be quite close to the plaintiff's boundary; but if the argument which has been advanced on behalf of the plaintiff is sound, it would equally apply, whatever quantity of land were taken or entered upon, and a local authority would be enabled to carry a drain for a mile or more through private land of every description without paying any compensation to the owner of that land.

In these circumstances the defendants, complaining that the connecting pipe had been laid in their land without their consent, caused it to be removed, and the plaintiff then brings this action to recover damages for the alleged trespass to his pipe. I have come to the conclusion that neither the plaintiff nor the local authority had any right to place the plaintiff's pipe in the defendants' land, and the defendants were, therefore, entitled to reassert their title to the land which had been used in this way without their consent. The appeal therefore fails.

A. T. LAWRENCE J. I am of the same opinion. The argument put forward on behalf of the plaintiff appears to me to carry the rights of the local authority too far. Those rights are startling enough, as is shewn by the decision in *Travis* v. *Uttley* (1), but there the rights were necessarily incident to the duties of the local authority, and therefore they were deemed to be within their powers. The argument in that case was that it was

(1) [1894] 1 Q. B. 233.

incredible that the Legislature should have intended that a drain which formed part of a private person's land should be vested in the local authority as a sewer. However startling that may be, it is nothing to the suggestion that is made in this case on behalf of the plaintiff. It is said that because s. 21 of the Public Health Act, 1875, gives the plaintiff the right to have his drain connected with some sewer of the local authority, that gives the local authority the right to select a sewer which is in private property, and which is a sewer simply by reason of the fact that it is a pipe receiving the drainage of more than one house. In my opinion there is nothing in the Act of 1875, or any other Act, to give the local authority the right to do that. It is true that the sewer is vested in the local authority, and the duty to repair it rests on them, and consequently they have the right to enter on the defendants' land for that purpose. I am, however, quite unable to agree with the contention that the local authority have the further right to permit the owner of any house in their district to connect his drains with it, and to enter the defendants' land and open it up over an unlimited area. I cannot suppose that such wide powers as that are given to the local authority, and without any provision for the payment of compensation. I do not think that that is the meaning or the necessary construction of s. 21, and in the absence of any plain provision in the Act to that effect the Act cannot be deemed to authorize a local authority to interfere with private rights in this manner. The defendants, therefore, were entitled to remove from their land a pipe which the plaintiff had no right to cause to be put there, and the plaintiff's action for trespass cannot be maintained.

Appeal dismissed.

Solicitor for plaintiff: *A. H. Procter.*
Solicitor for defendants: *Chalton Hubbard.*

F. O. R.

1907
June 18, 20.

TAYLOR, Appellant; WINSFORD URBAN DISTRICT COUNCIL, Respondents.

Public Health—Slaughter-house—Licence—Condition—Limitation of Time—Less than Twelve Months—Invalidity—Public Health Acts Amendment Act, 1890 (53 & 54 *Vict. c.* 59), *s.* 29.

By s. 29 of the Public Health Acts Amendment Act, 1890, licences for the use of places as slaughter-houses shall be in force for such time, not being less than twelve months, as the urban authority shall think fit to specify in such licences.

An urban authority granted to the appellant a licence, dated August 22, 1906, by which certain premises were licensed to be used as a slaughter-house "until December 31, 1906." Before December 31, 1906, the appellant applied for, but was refused, the renewal of the licence. The appellant was subsequently convicted for having used the premises as a slaughter-house on February 4, 1907, without having a licence in force:—

Held, that the conviction was wrong, for, there being no power to impose a condition limiting the duration of the licence to less than twelve months, the licence must be read as extending to August 22, 1907.

Case stated by justices for the county of Chester.

An information was preferred by the respondents, the urban district council of Winsford, being the local authority under the Public Health Acts, against the appellant, for that he on February 4, 1907, at Wharton, in the respondents' district, did use as a slaughter-house a certain building which was not in such use and occupation at the time of the passing of the Public Health Act, 1875, and without having from the local authority a licence in force for the use and occupation thereof.

On the hearing of the information the following facts were proved or admitted: In 1904 the appellant applied to the respondents for a slaughter-house licence in respect of the premises in question. The respondents required that certain alterations should be made in the premises before the licence was granted. These requirements having been complied with, the respondents on August 22, 1906, granted a licence to the appellant in the following terms:—

"The urban council for the district of Winsford, in the county

of Chester, being the urban sanitary authority for the said district, do hereby under the provisions of the Public Health Act, 1875, and the Public Health Acts Amendment Act, 1890, license certain premises situate at Rope Walk Farm, Wharton, in the district of the said urban sanitary authority, and now occupied by Mr. Samuel Taylor, to be used as a slaughter-house until December 31, 1906. Dated August 22, 1906."

On December 10, 1906, the appellant was convicted and fined for depositing in the slaughter-house for the purpose of preparation for sale a carcase which was unfit for the food of man.

On December 20, 1906, the appellant applied for a renewal of his slaughter-house licence. The respondents refused to grant the application.

The appellant was the occupier of the premises on February 4, 1907, and on that date used them as a slaughter-house.

The Public Health Acts Amendment Act, 1890, had been adopted by the respondents.

It was contended on the part of the appellant that, having regard to s. 29 of the Public Health Acts Amendment Act, 1890 (1), the limitation in the licence limiting its existence to December 31, 1906 (being a period of less than twelve months), was void, but that nevertheless the licence continued to be valid, and that the licence was good for an indefinite period; alternatively that the licence was a licence which could not expire in less than twelve months from the date thereof, and that it was a licence in force for twelve months from August 22, 1906, and that, therefore, the licence was valid and in force on February 4, 1907, the date of the alleged offence.

The respondents contended that the licence expired on December 31, 1906; that on February 4, 1907, the appellant had not any licence then in force; that the licence could not be said to extend beyond the date therein specified; that the appellant accepted and took the licence so issued to him without

(1) The Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 29: "Licences granted after the adoption of this part of this Act for the use and occupation of places as slaughter-houses shall be in force for such time or times only, not being less than twelve months, as the urban authority shall think fit to specify in such licences."

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demur or complaint; that his application for the renewal of the licence shewed conclusively that he considered the previous licence had expired.

The justices were of opinion that the licence was not in force on February 4, 1907, and that the appellant had no licence in force to use his said premises as a slaughter-house on that date. They also found as a fact that the appellant accepted the licence with the full knowledge that it expired on December 31, 1906, and that he had not appealed against the limitation contained in the licence or the refusal to renew the licence. They therefore convicted the appellant.

The questions of law for the opinion of the Court were as follows:—

(1.) Did the licence expire on December 31, 1906?

(2.) If not, was the licence in force (*a*) for an indefinite period; (*b*) for twelve months from August 22, 1906?

Owen Roberts, for the appellant. The conviction was wrong. The respondents had no power in granting the licence to impose a condition limiting its duration to a period of less than twelve months. The condition can therefore be disregarded, and the licence treated as one for twelve months from the date when it was granted, or for an indefinite period. [He referred to *Howarth* v. *Mayor of Manchester*. (1)]

Bankes, K.C., and *R. M. Montgomery*, for the respondents. The appellant was rightly convicted, because he failed to shew that at the date of the alleged offence there was a licence in force for these premises, the licence having expired on December 31, 1906. It is true that the respondents had no power to grant a licence for less than twelve months; but if the appellant objected to the imposition of the condition that the licence should only continue till December 31, 1906, his proper course was either to appeal to quarter sessions under s. 7 (*b*) of the Act of 1890, or to obtain a mandamus to the justices to hear and determine his application for a licence according to law. Having accepted a conditional licence in this form, and having subsequently applied for its renewal, the appellant must be taken to

(1) (1862) 6 L. T. 683.

have waived the objection, and cannot now be heard to say that he had a licence on February 4, 1907. The conviction can only be upheld by striking out of the licence the words "until December 31, 1906," but neither the justices nor this Court have power to do that, or to insert any other words of limitation, which would be necessary in order to prevent the licence continuing for ever. [*Reg.* v. *Mann* (1) was cited.]

Roberts replied.

Cur. adv. vult.

June 20. The judgment of the Court (Lord Alverstone C.J. and A. T. Lawrence J.) was read by

A. T. LAWRENCE J. This case raises the question whether a licence for the use of premises as a slaughter-house granted under the Public Health Act, 1890, s. 29, can be made to terminate in less than twelve months. The facts are shortly these: The appellant applied for a licence in the year 1904. He subsequently modified his premises to meet the requirements of the sanitary authority, and on August 22, 1906, a licence was granted to him containing the words "to be used as a slaughter-house until December 31, 1906." He was convicted of having used the premises as a slaughter-house on February 4, 1907, without having a licence from the local authority. The question in the case is whether the licence had expired on December 31, 1906. Sect. 29 of the Public Health Acts Amendment Act, 1890, enacts that licences "shall be in force for such time or times only, not being less than twelve months, as the urban authority shall think fit to specify in such licences."

It was argued for the respondents by Mr. Bankes that the limitation of time contained in this licence must be effective because it amounted to a conditional grant of the licence. We are of opinion that this contention is erroneous. Assuming the words are to be read as a condition, they are at most a condition subsequent, and if the licence be read, as for the purpose of testing its validity it must be, as containing a recital of s. 29, under which it is granted, and with this condition in it, the condition is repugnant to the grant, and is therefore void: see

(1) (1873) L. R. 8 Q. B. 235.

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Comyns' Digest, title "Condition" (D. 4). We think it was beyond the power of the authority to impose a condition limiting the duration of the licence to less than twelve months, and we think the licence must, therefore, be read as extending to August 22, 1907.

We see no ground for reading the licence as operative for a longer period, as contended for the appellant. The intention of the licensing authority to limit the operation of the licence is clear upon the face of it, and the fact that they exceeded their powers of limitation should not be treated as doing more than extending its duration to the period at which they could have first made it terminable, namely, August 22, 1907.

For these reasons we think that the information must be dismissed, and the conviction quashed.

Appeal allowed. Conviction quashed.

Solicitor for appellant: *E. A. Fuller, for J. Holland, Winsford.*

Solicitors for respondents: *Busk, Mellor & Norris, for J. H. Cooke, Winsford.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1907
May 29.

MORETON *v.* REEVE.

Employer and Workman—Compensation—Injury to Workman—Factory—Warehouse—Retail Business—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

There is no absolute rule of law that a store attached to a retail business cannot be a warehouse within s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897.

Green v. *Britten & Gilson*, [1904] 1 K. B. 350, explained.

This was an appeal against an award of the judge of the county court of Birmingham upon a claim for compensation under the Workmen's Compensation Act, 1897.

The applicant met with an accident whilst working for the respondent at his premises in Great Colmore Street. The respondent also owned two furniture shops; and the business which he carried on was found by the learned county court judge to be purely a retail business. He used one room in the premises in Great Colmore Street mainly for repairing old furniture, but partly for making new furniture for sale in his shops; and in the rest of the building he stored furniture for which there was no room in the shops. The learned county court judge held that, inasmuch as the premises in Great Colmore Street were merely ancillary to a retail business, they did not constitute a warehouse within s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, and he therefore decided against the applicant. After finding the facts he concluded his judgment as follows:—

"I have now to consider the judgment of the Court of Appeal in *Green* v. *Britten & Gilson* (1) in relation to the above facts. I have read through the judgments very carefully, and I have felt, and still feel, very great doubt as to their true effect, but I think on the whole that it was intended by the judges to lay down an absolute rule that a store which is merely ancillary to a retail business is not a warehouse within the Act.

"In the present case it appears to me that the premises were

(1) [1904] 1 K. B. 350.

C. A. 1907

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merely ancillary (or subsidiary or subordinate or appurtenant) to the retail business of the sale of furniture at the two shops, and I must therefore decide in favour of the respondent.

"If I were not so tied I should probably hold the premises to be a warehouse, as I think that they might correctly and fairly be so called in ordinary parlance, and they are within the definition in the Scottish case cited by the Master of the Rolls in *Green* v. *Britten & Gilson*." (1)

The applicant appealed on the ground that the arbitrator was wrong in law, and that he was not bound to find that the premises were not a warehouse.

Pritchett and *R. FitzJames Sawyer*, for the appellant. There is no general rule that a store attached to a retail business is not a warehouse within s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, and the Court did not intend in *Green* v. *Britten & Gilson* (1) to lay down any such principle. The language of the statute ought to be construed in its ordinary popular sense: *Haddock* v. *Humphrey* (2); *Buckingham* v. *Mayor, &c., of Fulham*. (3) This store was not merely ancillary to a retail business, as in *Burr* v. *Whiteley*. (4)

[COZENS-HARDY M.R. Some meaning must be given to the word "factory," under which a warehouse is included in s. 7, sub-s. 2.]

It is settled that the word "warehouse" must be construed without reference to any of the other words of s. 7, sub-s. 2: *Raine* v. *Jobson* (5); *Willmott* v. *Paton* (6); *Barrett* v. *Kemp* (7); Ruegg's Employers' Liability and Workmen's Compensation, 6th ed. p. 232.

[SIR GORELL BARNES, PRESIDENT. The Factory Acts contain provisions which would apply to warehouses, so that the words of s. 7, sub-s. 2, are satisfied.]

That is no doubt the explanation of those decisions. If the learned county court judge had not felt bound by the rule supposed to have been laid down in *Green* v. *Britten & Gilson* (1)

(1) [1904] 1 K. B. 350, 356.
(2) [1900] 1 Q. B. 609, 615.
(3) (1905) 21 Times L. R. 507.
(4) (1902) 19 Times L. R. 117.
(5) [1901] A. C. 404.
(6) [1902] 1 K. B. 237.
(7) [1904] 1 K. B. 511.

he would have held that this was a warehouse. There was evidence sufficient to support a finding that it was a workshop.

Shakespeare, for the respondent. There is no appeal on the question of fact, so the facts must be taken as found by the learned county court judge, and he has held that the respondent's business is purely a retail business and that this store is ancillary to it. Even if it is thought on the language of his judgment that he has not actually found that as a fact, the burden of proof was on the appellant, and he has not proved that this was an independent building. It is submitted that the learned county court judge was right in law. *Green* v. *Britten & Gilson* (1) has been generally accepted as laying down a definite rule that a store which is ancillary to a retail business is not a warehouse within s. 7, sub-s. 2. That was evidently the intention of the Court, and they followed *Colvine* v. *Anderson* (2), which was a decision to the same effect. A place is not necessarily a warehouse because goods are stored in it. The respondent was not a wholesale dealer, but a shopkeeper, and this store was a part of his shop in which furniture was repaired. It is well settled that a shop is not a factory, so it is reasonable to hold that a store attached to a shop is not a warehouse. The difference between a store-room and a workshop is pointed out in *Hunt* v. *Grantham Co-operative Society*. (3) The question whether this is a workshop cannot be raised now: *Smith* v. *Baker & Son*. (4)

Pritchett, in reply. The decision in *Green* v. *Britten & Gilson* (1) only applies to places used for the storage of finished articles. The Court said that a place which was used merely for the storage of goods which were to be sold in the retail business was not a warehouse. It has been already held in *Clark* v. *Clark* (5) that the decision does not go beyond that.

COZENS-HARDY M.R. This case has been very carefully and ably argued, and it raises questions of considerable difficulty although not of novelty. The true way in which to approach the case is to see what is the finding of fact of the learned county court judge, and

(1) [1904] 1 K. B. 350
(2) (1902) 5 F. 255.
(3) (1902) 112 L. T. Newspaper, 364.
(4) [1891] A. C. 325.
(5) (1905) Unreported.

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not to qualify or question that finding of fact, there being no appeal before us raising the point that there is no evidence to justify his finding, and then to see how he has applied principles of law to that finding of fact. Having read more than once the judgment of the learned county court judge, I think it is not unfair or improper to take the last three paragraphs of his judgment as stating in final form his finding of fact and the principle of law which he has applied to it. I take the middle paragraph first. He says: "In the present case it appears to me that the premises were merely ancillary (or subsidiary or subordinate or appurtenant) to the retail business of the sale of furniture at the two shops." That is a finding of fact which I am entirely disposed to accept. In the first of the three paragraphs he says: "I have now to consider the judgment of the Court of Appeal in *Green* v. *Britten & Gilson* (1) in relation to the above facts. I have read through the judgments very carefully, and I have felt, and still feel, very great doubt as to their true effect, but I think on the whole that it was intended by the judges to lay down an absolute rule that a store which is merely ancillary to a retail business is not a warehouse within the Act." Then the middle paragraph continues: "I must therefore decide in favour of the respondent." The question is whether the learned county court judge was justified in saying that it is an absolute rule of law that a store which is merely ancillary to a retail business is not and cannot be a warehouse within the Act. In my opinion there is nothing in the authorities which justifies so wide a statement of the law as that. It is only fair and just to limit the effect of language used by judges to the general nature of the facts to which their judgment is applied, and, although there are in the judgment of Collins M.R. in *Green* v. *Britten & Gilson* (1) one or two sentences which, taken by themselves, might lead to the conclusion that under no circumstances could premises which are merely ancillary to a retail business or shop be a warehouse within the Act, yet I do not think on the whole that that can be the fair meaning of the case. The illustration suggested by the President of a retail carriage business which keeps a large store for raw materials, it may be

(1) [1904] 1 K. B. 350.

for years, solely for the purpose of manufacturing goods to be sold in the retail shop seems to me to be one of such difficulty that it is impossible to say that the store could in no circumstances be a warehouse. Suppose the timber for carriage building required to be seasoned and was kept, not in the shop, but in an adjacent building or in a building at a considerable distance from the shop, and suppose it was kept, not for sale, but for no other purpose than the manufacture of carriages for the business, I do not think there is anything which binds us to say that that could not be a warehouse within the Act. And, when one remembers what sort of case *Green* v. *Britten & Gilson* (1) was, this limitation that I am putting on the effect of the language of Collins M.R. is justified. There the business was both wholesale and retail. The Court was only considering whether the arch which contained, not raw materials, but articles complete in themselves, was so used that it was right to hold that it could not be a warehouse. If the Court is dealing with a purely retail business and a shop where people come to buy things, and it finds that articles for sale are kept in another building, I do not think that building would be a warehouse within the meaning of the Act. That, however, leaves a large class of cases which are not covered by the language of Collins M.R. and Mathew L.J. in *Green* v. *Britten & Gilson.* (1) Now I should be very slow to question the general convenience and propriety of the rule that, a retail shop not being within the purview of the Act, a mere place used for the storage of goods sold in the shop is not a warehouse within the Act, and nothing I have said or desire to say in the present case must be taken to lend any colour to the suggestion that I am doing so. But, on the other hand, I do not think any such absolute rule of law is to be found as the judge applied in the present case. I think he has misdirected himself on the law as applied to the facts which he has found. I have felt some hesitation in coming to a conclusion as to what ought now to be done, but the next paragraph of the learned county court judge's judgment seems to me to shew that we have no option but to send the case back to him. If he had found as a fact that this

(1) [1904] 1 K. B. 350.

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was not a warehouse, I should not have come to this conclusion; but he has not held that, and it is not fair to him to say that apart from his view of the law he has found in fact that this is not a warehouse. We can only say that he has misdirected himself on the point of law, and the case must go back to him to find whether this is a warehouse—not under any absolute rule of law, for, as I have indicated, it will be open to him to hold on the evidence whether it is or is not a warehouse. But the question is one of fact: the judge will be unfettered as to the course he sees fit to pursue. He can require further evidence if he thinks it necessary, and he will deal with the costs of the first and also of the second hearings before himself. The costs of the appeal will be the appellant's in any event.

SIR GORELL BARNES, PRESIDENT. I agree. The only difficulty I have felt is whether we ought to decide the question now in favour of the appellant or send it back to the learned county court judge to be disposed of by him. For the reasons pointed out by Cozens-Hardy M.R. I think the latter course ought to be adopted. With regard to the question which has been chiefly argued there is no serious difficulty. The facts are these. The respondent had two retail furniture shops, and there was not room in these shops for all the furniture he had for sale. He had other premises two storeys high in Great Colmore Street, and over the door he described these premises as "Reeve's Warehouse" in large letters. There were generally twenty persons employed in repairing and renovating furniture and partly in making new furniture. He seems to have bought furniture and worked it up, and also to have bought large quantities of materials for making new furniture and repairing old furniture, and to have kept those materials on the premises. The learned county court judge says that the basement was generally full of old furniture, sometimes to the value of 600*l.* That is the judge's finding of how these premises on which the accident happened were used; and then, having found these acts, he finds himself in what he considers a difficulty by treating the decision in *Green* v. *Britten & Gilson* (1) as laying

(1) [1904] 1 K. B. 350.

down an absolute rule that a storehouse which is merely used in connection with a retail business is not a warehouse within the Act.

Now I think that when the judgments in *Green* v. *Britten & Gilson* (1) are carefully read having regard to the facts with which the Court was dealing and the cases cited to them—*Hunt* v. *Grantham Co-operative Society* (2) and *Burr* v. *Whiteley* (3)—it is apparent that the question raised in this case was not present to the minds of the learned judges who decided the case. They were dealing with a building used in connection with a wholesale and retail business for storage of goods for sale in either business, and I do not think they had any intention of laying down an absolute rule of law that no building can be a warehouse if it is connected with a retail business alone. It is possible even in a retail business to have a building which may be in the fullest sense of the term a warehouse, and I adopt the illustration which the Master of the Rolls has given in support of that proposition. It is quite true that many authorities distinguish between retail and wholesale businesses, and that may be a very good ground of distinction in a number of cases; but I cannot agree that that distinction can be absolutely conclusive in every case. If *Clark* v. *Clark* (4), which was cited to us, dealt with the matter on the lines of a retail business at all, it was inconsistent with the learned county court judge's decision in this case, but I doubt whether it really was a retail business in that case. It is sufficient to say that there cannot be such an absolute rule as the judge thought there was. The question whether it is or is not a warehouse is one which must be left open for consideration in each case, and perhaps the distinction between wholesale and retail businesses may generally be considered as a test. In this case it is quite possible that these premises may be a warehouse in the ordinary acceptation of the term, for large quantities of materials were stored there for a long time and in heavy pieces, and there may be the kind of danger referred to in *Colvine* v. *Anderson*. (5) That alone is to my mind sufficient to shew that

(1) [1904] K. B. 350.
(2) 112 L. T. Newspaper, 364.
(3) 19 Times L. R. 117.
(4) (1905) Not reported.
(5) 5 F. 255.

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there is room to find on the facts of this case that this building is a warehouse within the Act, and, as the learned county court judge has not dealt with that point, the case must, in my opinion, go back to him.

KENNEDY L.J. I agree with the judgments which have been pronounced. It seems to me that the learned county court judge, in thinking that it was intended to lay down an absolute rule, did not quite appreciate some of the language used in the judgments in *Green* v. *Britten & Gilson* (1), and by which he thought that he was tied to a particular decision. I cannot help thinking, after the great assistance we have received from counsel and the lengthy discussion of *Green* v. *Britten & Gilson* (1), that a great deal of the difficulty may have arisen from that which is noticed in the judgment of Mathew L.J., viz., the application of the word "ancillary." I have some difficulty in understanding the use of the word as applied to premises. Sometimes the word has a clear meaning, as in s. 4 of the Act of 1897, which speaks of work which is not complete in itself, but is "merely ancillary or incidental to, and is no part of, or process in, the trade or business." If the word can be applied to premises, I suppose that every warehouse is ancillary to a business of some kind. The goods are there to be used in some business, and, whether that business is conducted over the counter and the goods are sold in a shop or samples are produced and the goods are sold out of an office, the warehouse is equally in a sense "ancillary" to the business; but I confess it is a little difficult to me to carry the idea of premises being ancillary to other premises. I think the judge misunderstood the judgments of the Court of Appeal in *Green* v. *Britten & Gilson* (1) if he read them as deciding that the whole question is settled when once it is ascertained—first, that the business is a retail business belonging to the owner of the warehouse; and, secondly, that the business is carried on by the sale in the shop of articles which at some state of their manufacture were in the warehouse. He seems to have thought that if the business was retail and not wholesale then, whatever the place connected with the business might be,

(1) [1904] 1 K. B. 350.

it could not be a warehouse within the Act, though it might be a warehouse in ordinary parlance. I think he was mistaken, and I agree that the case must go back to him. We have no right to decide the matter for him, and the matter must go back to him with an intimation that he is released from the view he took about the law.

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Appeal allowed.

Solicitors: *Downer & Johnson, for Alfred & W. H. Green, Birmingham; William Hurd & Son, for W. Shakespeare & Co., Birmingham.*

H. C. R.

[IN THE COURT OF APPEAL.]

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May 29; June 4.

HANDFORD *v.* GEORGE CLARK & CO.

Employer and Workman—Compensation—Driller and Fitter — Employment "in, on, or about a Factory"—Ship moored alongside a Quay—"Undertakers" — "Actual Use and Occupation" — "Engineering Work"—Workmen's Compensation Act, 1897 (60 *&* 61 *Vict. c.* 37), *ss.* 1, 7, *sub-ss.* 1, 2—*Factory and Workshop Act,* 1901 (1 *Edw.* 7, *c.* 22), *s.* 104.

The mere juxtaposition of a ship to a quay is not of itself sufficient to make the person who meets with an accident in the ship a person employed on, in, or about a factory, and he will not be entitled to compensation unless the operations going on in the ship involve such a use of the quay as will bring in the provisions of s. 104 of the Factory and Workshop Act, 1901.

An "engineering work" must not only have reference to the locality, but also to the nature of the work which is being done at the time of the accident.

APPEAL against the award of the judge of the county court of Sunderland upon a claim for compensation under the Workmen's Compensation Act, 1897.

The appellants were marine engine builders; their works were situate on the river Wear. At the time of the accident the applicant George Handford, who was a driller, was one of their workmen.

The appellants had contracted with Sir James Laing & Son, shipbuilders, to construct the engines for a certain steam vessel which Sir James Laing & Son were building.

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The ship was built and launched at the shipbuilding yard of Sir James Laing & Son, which was on the south side of the river Wear and distant about 500 yards from the appellants' works. When in a sufficiently advanced state the ship was towed up the river in charge of Sir James Laing & Son's men alongside the quay of the appellants' engine works, where the boilers, engines, and heavy parts of the machinery were put on board and fixed so far as was necessary. The ship was then towed back to Sir James Laing & Son's yard, where the engines were coupled up and connections made, the ship at the time being moored fore and aft alongside the fitting-out quay in Sir James Laing & Son's yard abutting on the river Wear. Further pieces of machinery necessary for completing the engines were brought round to the shipbuilding yard from the appellants' works, and were shipped on board either by means of a travelling crane belonging to Sir James Laing & Son, and worked by their men when required for this purpose, or by being carried on board over the gangway between the ship and the quay. During this time Messrs. Clark's men were in occupation of the engine-room, engaged in fitting in and connecting the various pieces of machinery.

On May 8, 1906, the vessel had steam up in her boilers.

On May 12 the applicant, who had been engaged in drilling an inch-and-a-half hole in the box beam of the ship, was ordered to another job, and in going to get his tools fell through the flooring of the engine-room and was injured.

In July, 1906, the county court judge awarded the applicant compensation.

The applicant had nothing to do with the crane, and it was admitted that the only business he had with the quay was going to and fro therefrom on to the vessel. It was also admitted that the appellants had sufficient occupation of the engine-room to enable them to complete their work on the engines.

Messrs. George Clark, Limited, appealed.

The appeal was opened on December 19, 1906, but was remitted to the county court judge for further evidence, the result of which is given in the judgment of Cozens-Hardy M.R.

The appeal was heard on May 29 and June 4.

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On the facts being stated,

COZENS-HARDY M.R. said that he believed the present case was exactly covered by *Harrison* v. *The Oceanic Steam Navigation Co., Ld.* (1), a decision given in Appeal Court I. on December 18, 1906, to which he was a party, and he suggested that the present appeal should stand over to see if any note of that case could be found.

E. J. Macgillivray, for the appellants. The judgment in *Harrison* v. *The Oceanic Steam Navigation Co., Ld.* (1), exactly covers this case.

[He was stopped.]

Simey, for the respondent. The area occupied by the vessel in this case was either a "quay" or else part of the shipbuilding yard of Sir James Laing & Son, of part of which the appellants were in occupation, and therefore the accident happened in a "factory," and the appellants were "undertakers," or else this was an "engineering work," and the appellants were the undertakers of this engineering work. *Harrison* v. *The Oceanic Steam Navigation Co., Ld.* (1), does not touch this point; it goes no further than *Smith* v. *Standard Steam Fishing Co.* (2)

[*Macgillivray.* The point that this was an "engineering work" was not taken in the Court below, and therefore it cannot now be raised.]

This being the respondent's case, he is entitled to support the judgment appealed against on any ground he can.

[COZENS-HARDY M.R. The further evidence shews that George Clark, Limited, had no control whatever over the crane, and that it was not being used at the time of the accident.]

That makes no difference: a shipbuilding yard would only be an engineering work if there be machinery driven by steam or mechanical power upon it; and the steam crane being in this yard makes it an engineering work or a factory within the meaning of the Act.

[SIR GORELL BARNES, PRESIDENT. No machinery of any kind

(1) The case is not reported, but the following judgment (*post*, p. 420), which gives the material facts, was supplied by Messrs. Hibbit & Sanders, shorthand writers.

(2) [1906] 2 K. B. 275.

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was in use upon this ship at the time of the accident; all use for the steam crane had ceased for some time.]

The mere fact that there is machinery driven by steam or other mechanical power upon a given area makes it an engineering work: *Berwickshire County Council* v. *Middlemiss* (1); *Reid* v. *P. R. Fleming & Co.* (2); and the mere accident that the crane was not working makes no difference. Prior to *Houlder Line, Ld.* v. *Griffin* (3) it is clear this workman would have been entitled to compensation; the occupation of the quay by the vessel need not be an exclusive occupation: *Merrill* v. *Wilson, Sons & Co.* (4); *Bartell* v. *W. Gray & Co.* (5) The employment of the respondent had direct relation to the purpose for which the quay or factory was being used by his employers; the county court judge has found this fact in favour of the respondent.

COZENS-HARDY M.R. We will not trouble you, Mr. Macgillivray. In deciding this case I have the satisfaction of feeling that no point which could be urged on behalf of the appellant has been overlooked by counsel, or has not been considered by the Court. But now that we know the facts I have no hesitation in saying that the view taken by the learned judge was wrong, and that this appeal ought to be allowed.

The facts when this matter was before us on a former occasion were by no means clearly ascertained. We felt then that there was not sufficient evidence to justify the finding of the county court judge, and we thought that it should go back to him to find further facts, and call further evidence if necessary, as to what parts of the machinery on the ship in question were put in by Messrs. Clark—on what part of the machinery the applicant was at work at the time of the accident, and what use was made of the travelling crane on Laing's quay, and by whom and under whose control was such crane being used. Speaking for myself, with some recollection of what took place, I think that

(1) (1900) 37 Scottish Law Reporter, 297; 2 F. 392.
(2) (1901) 38 Scottish Law Reporter, 720; 3 F. 1000.
(3) [1905] A. C. 220.
(4) [1901] 1 K. B. 35.
(5) [1902] 1 K. B. 225.

last point was that which most impressed the members of the Court at the time.

Now we have not had a distinct answer from the learned judge in the form of a finding on these questions, but he has sent us a note of the evidence, which he thought material. Now that we have this further evidence before us, I think it is plain that this vessel had had all the machinery put inside her some time before the accident; that she had been under steam on May 8; that she was after that at the old berth on the side of Laing's quay for the purpose of some repairs, and the completion of certain unimportant defects which were found to exist in the machinery; but all the heavy work that required to be done by the aid of the steam crane on Laing's quay was a matter of ancient history. That work had been done and completed before May 8, and I think, further, the evidence shews this, that even during the time when that steam crane was being used on Laing's quay it was used by Laing's men, who had the control of it; but when Messrs. Clark had machinery which required to be taken into the vessel, and which was more easily taken in over that side than by means of a lighter, Laing's men did use the crane for the purpose of lifting the machinery from the side of the quay into the ship.

Under these circumstances it is said that the applicant, who met with his accident as he was taking away his tools to go to another ship from something which happened inside the ship, and not in any way connected with the use of the crane, can claim compensation on the ground that Messrs. Clark are undertakers within the meaning of the Act, and that his accident happened either on, in, or about a quay; or on, in, or about a shipbuilding yard; or on, in, or about an engineering works. Apart from the decisions which have been arrived at by the Court of Appeal, following as best we could the decisions of the House of Lords, I do not think that, in approaching this matter clear of any authority, I should have the slightest hesitation in saying that the applicant had failed to make out his case; and even after the great number of decisions on this Act, I equally feel no doubt, having regard to the latest decisions, that the applicant cannot make out his case. The first, and in some respects

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I think the most easily argued, point on behalf of the applicant was that Messrs. Clark were occupiers of a quay, not on the ground that it was employment by the undertakers on, in, or about a quay. In the first place, it seems to me quite plain that since the decisions of this Court in *Smith* v. *The Standard Steam Fishing Co., Ld.* (1) and *Harrison* v. *The Oceanic Steam Navigation Co., Ld.* (2), the mere fact that a vessel is moored alongside a quay is not of itself enough to make the person who meets with an accident in the ship employed in, on, or about a factory. But it may well be that the operations going on in the ship involve such a use of the quay or portion of the quay alongside as suffices to bring s. 104 of the Factory Act into operation, that section saying that the person having the actual use or occupation of a dock, wharf, quay or warehouse, or of any premises within the same or forming part thereof, shall be the occupier of the factory. Take, for instance, the part of the quay alongside a vessel which is being loaded or unloaded, it is probably true that there is under those circumstances such an actual use and occupation of a portion of the quay as would suffice to bring persons engaged in the operation of loading or unloading within the benefit and meaning of the Act. Further, it may well be (and this was the point I think upon which we desired information when the matter was before the Court previously) that the use of certain machinery or plant on a quay in this sense, that for a reasonable amount of time it is put under the control and exclusive management of the shipowner or of anybody employed by the shipowner, may be sufficient to bring into force the strange definition in s. 104, which says that the person so using the machinery or plant on the quay is to be deemed to be the occupier of a factory. On the evidence in this case it is clear that there was no use of the machinery or plant within the meaning of that section, the only machinery or plant that has been suggested being the crane, and it is impossible to say in any true sense of the word that there was any actual use or occupation of any portion of the quay by Messrs. Clark & Co. in respect of the

(1) [1906] 2 K. B. 275. (2) Post, p. 420.

transactions which we have had before us. I therefore think that it is impossible that the claim can succeed on this point. I am not sure that I need really have done more than say that the observations made by the Court of Appeal, and especially by Lord Collins, in *Smith* v. *The Standard Steam Fishing Co., Ld.* (1), and in *Harrison* v. *The Oceanic Steam Navigation Co., Ld.* (2), really suffice to decide this case. It cannot fairly be asserted or assumed that those cases were decided simply on the ground that the ship itself did not occupy part of the factory. It was manifest to everybody—and the whole argument proceeded upon this—that the vessel in those cases was alongside the wharf or quay, or connected with the wharf or quay by a gangway or by ropes or something of that kind; and those decisions do, it seems to me, amount to this, that the mere fact that a vessel is berthed alongside a quay, and in some sense, of course, that the quay is being used for obtaining access to or from the land from or to the ship, is not enough to bring either the vessel itself or the portion of the quay which it so uses within the definition of factory under the Act.

Then can it be said that the area of space occupied by the ship made it part of a factory? That is in the teeth of the decisions, and Mr. Simey has not ventured to argue it. Then he laid great stress on the fact that this was engineering work, and that this applicant was engaged upon a work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power was used. On the facts of this case I cannot see that that really arises. It is true that mechanical power had in the earlier part of the history of this ship been used, but the use of this steam crane for the purpose of construction, alteration, or repair had ceased long before. I think it is right to say this also, that the work in which the applicant was engaged at the time had, in the language of Lord Collins in the last case, *Harrison* v. *The Oceanic Steam Navigation Co., Ld.* (2), no relation whatever to the juxtaposition of the vessel to the quay. It seems to me that the words "engineering work" must not only have reference to the locality, but must have reference to the nature of

(1) [1906] 2 K. B. 275. (2) Post, p. 420.

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the work which is being done at the time. Only one relevant authority was called to our attention on this part of the argument —the Scotch case *Berwickshire County Council* v. *Middlemiss.* (1) That decision commends itself entirely to my mind. That was a case where a steam-roller was being employed in repairing a certain portion of the road. Among other people who were engaged in this occupation was a man with a water-cart; it is well known that that is really a necessary part of the operations. During the dinner hour the steam-roller was not at work—the steam-roller went afterwards in one direction and the cart in another, but all for the purpose of repairing and making the road, which is in terms an engineering work; and although the man was injured not because the horse ran away by reason of the working of the engine, but from some other cause, he was nevertheless injured in the course of an engineering operation, in which engineering operation at that very moment of time both the engine and the horse and cart were actually engaged.

For these reasons I think that the learned judge was wrong in the view which he took, and that, now we know all the facts, the appellants were not undertakers within the meaning of the Act, and that there is no ground for holding the applicant to be entitled to compensation.

SIR GORELL BARNES, PRESIDENT. I agree. I do not desire to say anything in addition to what the Master of the Rolls has said with regard to the authorities, because he has very carefully considered them. This case seems to me to depend upon the application of established principles to the particular facts of the case. [After shortly stating the facts, his Lordship continued:—] According to the facts, I think it is perfectly clear that all the machinery was on board, and that this driller or fitter was engaged at the time of the accident in finishing off the necessary final connections of the smaller parts of the machinery or something of that character. This vessel, according to the note of the evidence of the foreman of the works, was under steam on May 8, the accident happening on the 12th. Whether under steam there means that she moved away from the wharf or that

(1) 2 F. 392.

her engines had steam up merely for the purpose of trying them does not appear to me to make very much difference; but it looks to me as if this vessel was nearly completely finished, because her trial trip took place on May 24, 1906. Those are dates which are material in connection with one of the main arguments of counsel for the applicant on the question of engineering work. [After stating the result of the further evidence, and the finding of the county court judge, his Lordship continued:—]

The question is whether, upon the evidence which has been given, there is anything to justify the finding that the place where this accident happened was a "factory," and that the respondents were "undertakers" in respect of the factory. The point as to "engineering work" does not seem to have been taken in the Court below, but, as it has been raised here by counsel for the applicant, I propose to say a few words on that point.

The way in which it is sought to make out that this is an engineering work is this. It is said that s. 7, sub-s. 1, of the Workmen's Compensation Act is to apply to the employment by an undertaker "on, or in, or about a railway, factory, mine, quarry or engineering work." Then by sub-s. 2 "engineering work" is defined to mean "any work of construction or alteration or repair of a railroad, dock, canal, or sewer" (none of those words are relied upon), and it includes also "any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." The contention was that this man was engaged on such work as is referred to in the last words of that definition. Now it seems to me that the facts do not make that out in favour of the applicant. The way it was put by counsel for the applicant was that the words really only defined the area, and that so long as there was within the area in which this ship was anything being done by machinery driven by steam, water, or mechanical power—by this crane, for instance—whether to this ship or any other ship in that locality in connection with that yard, that would be sufficient to bring this in as a case of engineering work. I cannot myself take that view of those words, because I cannot read this word "work" as only relating to the

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locality. It seems to me the words must also involve the idea of the class of work that is being done; and when once that is brought in we have this state of things, that although this crane which has been so much referred to in argument may have been used and was used in the course of the construction of the ship to put on some machinery which was put on at Laing's yard, it was not used by the appellants themselves, and it was used for work which was entirely at an end so far as the crane was concerned. The evidence seems to me clear on that point. All that remained to be done in connection with this part of the vessel, or in connection with any part of the vessel, was that some fitting-up and finishing-off work was being done, and the crane had no more to do with the matter, and had no more connection with the use of the ship at that time, than if it had never been used at all. It seems to me it would reduce the case to an absurdity if it is to be said that if a crane was once used on that ship and had become a matter of ancient history so far as construction was concerned, still work which this crane was engaged upon is to be considered engineering work within the meaning of the section, although no mechanical power of any kind is at the time or has for long been used in connection with the machinery.

The next point made was that this was within the term "factory" referred to in s. 7, because it was a quay. That brings in the definition of "factory" to include a quay, and it also brings in the Factory and Workshop Act, 1901, s. 104, as to the word "factory," and in addition to that there is the necessity for considering the word "occupier," because the "undertakers" in the case of a factory mean the occupiers within the Factory and Workshop Act, and in this case the occupier might be or would be a person—the appellants if the facts established it—in the actual use and occupation of the quay or of premises within the same or forming part thereof, or using plant or machinery referred to in the section. Upon the facts here, again, it seems to me that in the first place the vessel was in a navigable river. She was not in any other sense part of the quay, or within part of the premises or forming part of the premises. The only way in which it is sought to bring in the term is that there was machinery or plant being used on the quay in connection with

her, which might therefore bring the appellants in as occupiers or actual users of the premises, namely, the quay adjoining, and that the ship might therefore be treated as being within that. It is sufficient in this case to say that the facts will not support such a suggestion. The appellants were not occupiers of the quay itself; they were not users of it; they were on the facts not occupiers or users of the crane; that crane was only, so far as it was used at any time, used by Laing's people for the purpose of putting on board the ship, when requested by the appellants, such and such a piece of machinery when it was required. The work of user and the state of occupation was not at all, it seems to me on the facts of this case, in the appellants.

The last point made was that the case came within the definition of factory, which includes a shipbuilding yard. There, again, the point is practically met by what I said upon the point in connection with the word "quay." This vessel was not in a shipbuilding yard. She was not in any premises occupied, used, or enjoyed in any shape or form by the appellants. Therefore my opinion is that this case is not a case within the Act, and is not a case in which compensation can be given to the applicant.

KENNEDY L.J. was also of opinion that the appeal must be allowed, as the finding of the county court judge was not warranted by the facts, but, as his judgment was entirely confined to a criticism of the facts and the findings of the county court judge, it is not considered necessary to report it.

COZENS-HARDY M.R. I should like to add that all the members of the Court are very grateful to the shorthand writers for so kindly supplying them with a transcript of the judgment in *Harrison* v. *The Oceanic Steam Navigation Co.* (1)

Appeal allowed.

Solicitors: *Smiles & Co., for James Storey & Son, Sunderland; Hennen, Edgelow & Co., for N. B. Way, Sunderland.*

(1) Post, p. 420.

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December 18, 1906.

HARRISON *v.* THE OCEANIC STEAM NAVIGATION COMPANY, LIMITED.

COLLINS M.R. This is an appeal from the learned county court judge of Liverpool, who found that a man employed in assisting in an operation in the nature of overhauling, or repairing, the machinery of a ship called the *Celtic*, lying in Huskisson's West Side Dock, was not within the Workmen's Compensation Act so as to be entitled to receive compensation in respect of an accident which happened to him while he was on board the ship. The ship was lying alongside the quay in the Huskisson's Dock; she had been put there in the ordinary course, and was occupying a space which was kept by the owners, the White Star Company, for their particular vessels. She had discharged her cargo, and at the time was unloaded, and advantage was taken of that opportunity to overhaul the machinery. The shaft had been taken out of the ship to a workshop belonging to the owners some twenty minutes' or a quarter of an hour's walk from where the vessel was. It had then been brought back from that workshop, and was in the process of being replaced in the ship, which was lying alongside the quay, as I have said. It was in the process of that operation that the workman met with the accident.

Under those circumstances the learned county court judge, in view of the decision in the House of Lords in *Houlder Line, Ld.* v. *Griffin* (1), followed by the decision of this Court in *Thompson* v. *F. & W. Sinclair* (2), came to the conclusion that the applicant had not made out the necessary conditions to entitle him to compensation under the Act.

Now in order that a workman may entitle himself to compensation under the Act he must shew that he has been employed "on, in, or about" a factory in respect of which his employer is "the undertaker." Unless he can fulfil those conditions he does not come within the remedy provided by the Act.

In this case the workman was undoubtedly in the employ of the shipowners, and he has to shew that the shipowners were the undertakers of the factory "on, in, or about" which he was engaged in working at the time of the accident. The applicant cannot suggest, it seems to me here, since the decision of *Houlder Line, Ld.* v. *Griffin* (1), that a ship lying alongside a quay in a dock is occupying a factory. That appears to me to be negatived in express terms by the decision in *Houlder Line, Ld.* v. *Griffin* (1), a passage from which was cited by Romer L.J. and myself in delivering judgment in *Smith* v. *The Standard Steam Fishing Co.* (3), a decision to which my brother Cozens-Hardy L.J. was also a party, which points to that as being one of the essential features of the decision, namely, that a ship floating in a dock does not involve the occupation either of a dock or of some definite place in a dock, to constitute the occupation of a factory, which is essential in order to let in a remedy under the Act. Then, to get rid of the water space in the dock, we have Lord Macnaghten saying that the

(1) [1905] A. C. 220.
(2) [1906] 2 K. B. at p. 278.
(3) [1906] 2 K. B. 275, at pp. 279, 281.

expression "dock" in this Act does not mean the water space in the dock; and therefore, in order to introduce a "factory" into the present discussion, we have to fall back on a "quay."

Now there is no doubt that mooring the ship to the quay did involve, to a certain extent, the occupation of the quay. Therefore, if the workman can bring himself into the position of being engaged in work on the quay, or incident to the work associated with the quay, and can shew that the accident happened to him while engaged in that work, he would then bring himself within the words of a person said to be engaged on, in, or about a factory of which his masters were the undertakers; and if the effective purposes for which the quay existed were really brought into operation in this case, if the work that the man had to do was connected in any sense with the sort of work in which a quay is to be deemed to be a factory, then it seems to me he might have a remedy. But the quay here has no place in the discussion. It merely afforded the purpose that a gangway affords, to step off the quay on to the ship. The work which he had to do could have been equally well done if he had approached the ship on the other side by a boat. The juxtaposition of the vessel to the quay had no relation to any work that he had to do. He was not in any sense employed on, in, or about a factory to which the quay was necessarily adjacent. One can easily see for one's self the uses to which a quay is put when it is made a factory. The Legislature thought, no doubt, that the work involved on a quay, as a quay, was such as to make it dangerous, and therefore, for the purposes of that work, they made a quay a factory. Factories by this Act are places where work, usually by the aid of machinery, is carried on involving risk to persons engaged in it; and for certain purposes no doubt a quay is, and may be, a factory when persons are actually employed upon it; and when you get to that position in reference to an undertaker of that sort, that quay is a factory. Here, as I have pointed out, it is a mere accident that the quay happened to be in juxtaposition to the ship. The quay had nothing to do with the work which the plaintiff had to do. Therefore it seems to me that the learned county court judge was really following the decision in the House of Lords and in this Court when he decided this case, which in point of fact falls directly within the facts of *Thompson* v. *F. & W. Sinclair.* (1)

There is only one observation I should desire to make upon the learned judge's judgment, and that is that it seems to me he does not use quite accurate language when he describes a ship as "a factory"; that expression involves an inaccuracy which I have noticed more than once in cases of this kind. The ship never was a factory, nor is it right to refer to it as ever having been held to be a factory. The utmost that has ever been held is that if you have a factory in this sense that the dock is a factory, and you have a ship in a dock, then the man in the ship in a dock is in a factory: but none of these cases involve the proposition that a ship becomes a factory; it never does—it occupies a space in a factory, and the man being in the ship occupying a space in a factory is in a factory. I only make that observation because I notice that inaccuracy has crept into the head-note of one of the cases which

(1) [1906] 2 K. B. at p. 278.

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is frequently referred to in these matters, and, therefore, I thought it right on this occasion to point it out.

For these reasons I am of opinion that this appeal fails.

COZENS-HARDY L.J. I agree. I think the origin of the misapprehension to which the Master of the Rolls has alluded was probably due to an error in the head-note to the case of *Bartell* v. *Gray & Co.* (1), in which the Court of Appeal are made to say: "Held, the ship was a factory." Nothing was further from the truth than that statement. What was said was that the ship occupied part of a dock which was a factory, which is a very different thing. I only wish to add that it would be best in my view to rely on the decision of this Court in *Thompson* v. *F. & W. Sinclair* (2), which seems to me indistinguishable from the present case.

FARWELL L.J. I agree; and I must confess that if this very obscure Act had not been rendered more obscure by decisions binding me, I should have been prepared to have come to the same conclusion.

Appeal dismissed.

W. C. D.

C. A. 1907 *June* 4, 5.

[IN THE COURT OF APPEAL.]

WILLIAMS *v.* THE OCEAN COAL COMPANY, LIMITED.

Employer and Workman—Accidental Death of Workman—Compensation—Dependency on Workman's Earnings at Time of Death—Widow—Posthumous Child—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

A workman was married to his wife in 1903, and for about nine months they lived with her parents. They then lived in apartments for three months, and afterwards with the husband's parents for about six weeks. The wife subsequently returned to her own parents, her husband having left her to seek work, and being ultimately employed as a miner in an adjoining village, where she occasionally went to see him. She last saw him in December, 1905, and in April, 1906, he was killed while working for the defendant company. A posthumous child, of which the deceased was the father, was born in September, 1906. The husband had not contributed to the wife's support since 1904, and in January, 1906, she went into domestic service, where she was earning 12*l.* a year at the time of the death.

In these circumstances, upon a claim by the widow and child for compensation under the Workmen's Compensation Act, 1897, the county court judge held that neither the wife nor the child was dependent on his earnings:—

Held, on appeal, that the county court judge had overlooked the

(1) [1902] 1 K. B. 225. (2) [1906] 2 K. B. at p. 278.

legal presumption of dependency in the case of the wife, and had considered that the fact that the wife was receiving nothing from her husband at the time of his death was conclusive. His decision was wrong, and there was a total dependency of the wife.

Held, further, applying the rule in *Villar* v. *Gilbey*, [1907] A. C. 139, that the posthumous child was also a dependant.

APPEAL from a decision of the judge of the Pontypridd County Court, sitting as arbitrator under the Workmen's Compensation Act, 1897, raising two questions—(1.) whether the applicant, Margaret Ann Williams, the widow of William Edward Williams, was dependent upon his earnings at the time of his death within the meaning of the Act; and (2.) whether his posthumous child was similarly dependent.

The applicant was married to her husband on March 18, 1903. The wife was then living with her parents, and after March the husband came to live with her there. They remained with the wife's parents till January, 1904, when they went into apartments, where they remained for three months till Easter, 1904. During this period the wife gave birth to a child, who died. The husband then went to Anglesey, of which county he was a native, and took his wife with him. He stayed there with his wife at his own parents' house for about six weeks, when he went to Newport to go to sea, leaving his wife in the charge of his own parents. In June the wife returned from Anglesey to her own parents. Her husband did not communicate with her before she left Anglesey, but when she returned to her parents she found that her husband had not gone to sea, but was working as a miner in Blaengarw, an adjoining village. She went over to see him there on several occasions, and in August Bank Holiday week of 1904 she went over and spent a week with him in his lodgings. She saw him again in October, 1905, but did not speak to him on that occasion. From October, 1904, to July, 1905, there was no evidence that she heard at all from her husband. In January, 1905, she gave birth to another child, who also died. In July, 1905, she received a letter from her husband from Liverpool, apparently returning from a voyage. In that letter he asked her to go to Liverpool to meet him. Her father declined to permit her to go, and the husband came back to Blaengarw, and there worked at the respondents' collieries.

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In October the wife received a message that her husband was on the mountain and wanted her to go up to him. She went up the mountain, met her husband, and he arranged with her that he would visit her again, coming as he had come that day over the mountain, and wave a red handkerchief as a signal, on seeing which she was to go up the mountain to meet him. On December 21, 1905, the signal was seen, and the wife went up and met her husband. At this meeting the husband had conjugal intercourse with his wife, with the result that a girl was born on September 21, 1906. On April 3, 1906, the husband was killed while working in the respondents' collieries. After December 21, 1905, the wife did not see her husband again or have any communication from him. About the beginning of the year 1906 she went into domestic service, in which she continued up to the time when her husband was killed. She was receiving 1*l.* a month in addition to her board wages. There was no evidence that the husband had maintained his wife or contributed anything towards her maintenance from the time when she returned from North Wales in 1904.

The widow claimed compensation under the Workmen's Compensation Act, 1897, for herself and her child, as having been wholly dependent on her husband's earnings at the time of his death. The county court judge held that the applicant was not so dependent. He was further of opinion that the case of a posthumous child of a deceased workman had not been dealt with by the Act, and that as the applicant was not dependent within s. 7, sub-s. 2, the child could not be held to be so either. He accordingly made his award in favour of the respondents.

The applicant appealed.

S. T. Evans, K.C., and *John Sankey*, for the appellant. In this case there was no desertion of his wife by the workman, and no separation, though the couple were for the time living apart; this, however, does not prevent the appellant from claiming to be a dependant on her deceased husband. Dependency turns on the legal liability of a husband to support his wife; it is not necessary that she should be actually supported by him at the

time of his death: *Sneddon* v. *Robert Addie & Sons' Collieries*. (1) The county court judge seems to have entirely omitted to take into consideration this legal liability of the husband, and has misdirected himself in point of law. The presumption that the husband is liable can be rebutted by facts, but it will not be rebutted by the mere fact that the husband had deserted his wife, or by the fact that the wife was supported by relatives, or was earning something on her own account: *Coulthard* v. *Consett Iron Co.* (2) This is a mixed question of fact and law from which there is an appeal; that it is not a mere question of fact is clear from *Stanland* v. *North Eastern Steel Co., Ld.*, decided in Appeal Court I., December 21, 1906. (3) In *Stanland* v. *North Eastern Steel Co., Ld.* (3), the facts as against the dependency of the wife were even stronger than in the present case. That decision was not cited before the learned county court judge. Here there are certain admitted facts, the legal consequence of which is that the appellant is either dependent within the meaning of the Act or she is not, and the proper conclusion to be drawn from these facts is a pure question of law: *Reg.* v. *Clarke*. (4)

It is submitted that in ignoring the legal presumption of dependency of the wife the county court judge has misdirected himself on the question of law.

(1) (1904) 6 F. 992.

(2) [1905] 2 K. B. 869.

(3) Not reported, but a judgment from notes of counsel was read to the Court. The facts in that case were as follows: The applicant was married to the deceased on September 6, 1885. There were eight children of the marriage, three being alive at the date of the death. In March, 1904, the deceased left the applicant to look for work. Previously to that they had lived at Middlesbrough for seventeen years. The applicant never heard from the deceased after March, 1904, and did not know where he was. She thought he would come back as he had done once before after an absence of nine weeks. He was killed while in the employ of the respondents in 1906. After her husband left her the applicant maintained herself and her children for some weeks and then went into the workhouse with them for three months. She afterwards lived with her mother and earned small sums by taking in washing and going out charing.

The county court judge held that the applicant was not dependent on the deceased at the time of his death. On appeal from that decision the Court of Appeal held that there was a presumption of dependency of the wife upon the husband which had not been rebutted. They therefore reversed the decision of the county court judge.

(4) [1906] 2 I. R. 135, at p. 163.

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[Upon the question whether the posthumous child was a dependant they were stopped by the Court.]

Ruegg, K.C., and *Albert Parsons*, for the respondent. The decision appealed from is right; and whether it is right or wrong this Court has no jurisdiction to interfere. The question whether the applicant was dependent on the husband's earnings at the time of his decease is one of fact, and this Court will not interfere with the finding of the arbitrator on that question: *Main Colliery Co.* v. *Davies* (1); *Rees* v. *Penrikyber Navigation Colliery Co.* (2)

There is no distinction in principle between the case of a wife and that of any other relative. It may be admitted that a wife is prima facie dependent upon her husband, but the county court judge found as a fact that the husband had deserted the applicant and that she had acquiesced in his desertion. Having come to the conclusion that the husband never meant to contribute to the wife's support, and that she never meant to compel him to do so, he was bound to find as a fact that there was no dependency, and that is what he has done. It would have been impossible for him to hold that there was total dependency here, but if this Court thinks that he has misdirected himself on a question of law, then the case ought to go back to the county court upon the question of total or partial dependency. It cannot be said that in such a case the county court judge was bound to find that there was total dependency.

COZENS-HARDY M.R. This appeal raises a point of importance and difficulty under the Workmen's Compensation Act. The difficulty for us would have been far greater had not this Court in *Stanland's Case* (3) decided, in my view, the point which arises for decision here: and I doubt whether it is open to us to come to any other conclusion than that this appeal must be allowed. But as *Stanland's Case* (3) has, unfortunately, not been reported, it is perhaps desirable that I should state in my own words what I understand to be the legal position in a case like this where a wife is claiming to be a dependant upon her deceased husband

(1) [1900] A. C. 358. (2) [1903] 1 K. B. 259.
(3) See note (3), ante, p. 425.

who, as admitted, met with his death under circumstances which render the employer liable to pay compensation.

In the present case the wife was at the date of the death pregnant with a child who has since been born, of which the deceased was the father. They had not been living together in the ordinary way in which a husband and wife live: the husband had not been keeping a home for her in fact, and had not been contributing one penny to the maintenance of the wife for some considerable time. In approaching a case of this kind I think it is important to remember what is the true question for the tribunal which decides it. Dependency, as it seems to me, must always be a mixed question of law and of fact. I desire for myself to adopt the language of Holmes L.J. in *Reg.* v. *Clarke* (1), where he said: "We have only jurisdiction to hear an appeal on a question of law, and it may be thought whether a wife is dependent wholly or in part on her husband's earnings is more a matter of fact than law. This sometimes may be so, but it is not in the present case. We have here certain admitted facts, the legal consequence of which is that the claimants are either wholly dependent or are not; and the proper conclusion to be drawn from them is a pure question of law."

In the case of a wife, I think it is established by authority that there is a presumption in favour of the dependency of the wife. That was certainly asserted by us in *Stanland's Case.* (2) It is not a presumption which cannot be rebutted, but there are some circumstances which certainly are not sufficient to negative or rebut that presumption. The presumption is not rebutted by the mere fact of desertion. It is not rebutted by proof that de facto not one penny was being contributed by the husband to the wife's support at the time of his death. It is not rebutted by evidence that the wife was in fact being kept alive and maintained by her relations as a matter of charity or kindness. It is not rebutted merely by evidence that the wife is not being supported by her husband, or is maintaining herself by going to domestic service, earning small sums of money as a charwoman, or otherwise. It is not rebutted by proof that she was in the workhouse at the date of his death. The presumption can only

(1) [1906] 2 I. R. 135, at p. 163. (2) See note (3), ante, p. 425.

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be rebutted by there being reasonable evidence justifying a Court in coming to the conclusion that this presumption, like any other presumption, is in fact rebutted.

In the present case the learned county court judge, as I read his judgment, has in the first place entirely overlooked the legal presumption with which he ought to have started. In the next place, he has considered that the fact that she was not receiving one penny from her husband at the date of his death is conclusive. At the end of his judgment he says this: "I have come to the conclusion that it would be absolutely impossible for me really to hold that this lady at the time of the death of the workman was dependent upon his earnings. To hold that would be holding, in my opinion, that to be a fact which is not a fact—to hold that which really is untrue." It is not contended for the respondents that if that is the view upon which the learned county court judge proceeded, he has not misdirected himself. I think it is impossible to read the judgment of the learned county court judge without coming to the conclusion that he has gone wrong on both those two points, viz., first, ignoring the presumption, and, secondly, treating it as a mere question of whether the wife was in fact getting any part of the earnings at the husband's death. As I say, I think on those two points the learned judge has gone wrong, and that in any point of view his decision cannot stand.

Then comes the point whether, under these circumstances, we are bound to send it back or whether it is not within our power, and if it is within our power, whether it is within our duty, ourselves to deal with the matter and to say that upon the admitted facts there is nothing here sufficient to rebut the legal presumption. I think that is the true position of the case. That is what was done by the Irish Court of Appeal in the case of *Reg.* v. *Clarke* (1) (and that is what was done in *Stanland's Case* (2)), where the county court judge had found there was no dependency, and where, moreover, there was no such clear misdirection as there is here; but, nevertheless, the Court of Appeal there did not send it back, except in this sense, they declared there was total dependency and merely sent it back to the county court judge to assess the figures on that footing. Of course, if the

(1) [1906] 2 I. R. 135, at p. 163. (2) See note (3), ante, p. 425.

figures had not been agreed here, we should have had to send it back to ascertain the figures. Here we hold that, as a matter of legal inference upon the facts in evidence, there was the position of total dependency; and it follows from that that the amount of liability is that which the parties have agreed at the trial.

There is only one other point upon which I do not think it is necessary to say more than a few words. There was a posthumous child. Is that posthumous child dependent within the meaning of the Act? I think he is. There has of recent years been a great deal of discussion on points very similar to this; but the last case in the House of Lords, *Villar* v. *Gilbey* (1), decided that a child en ventre sa mère is to be deemed born so far as necessary for the benefit of that unborn child. That is not merely a rule of real property law—it is a rule applicable to personal property, and it is a rule which, in my view, ought to be applied for the benefit of this posthumous child in dealing with this Workmen's Compensation Act. I hold, therefore, that the posthumous child is dependent as well as the mother in the circumstances. In my view this appeal must be allowed with costs here and below, and the money must, I presume, be paid into Court.

SIR GORELL BARNES, PRESIDENT. I agree. It seems to me that the question which we have to determine in this case has really been decided in the case of *Stanland* v. *North Eastern Steel Co., Ld.* (2), to which the Master of the Rolls has referred, and with which he is much more familiar than I am, because I understand he was a party to the judgment. That case, following on the principles which are indicated in the Scotch case of *Sneddon* v. *Addie* (3) and the English case in this Court of *Coulthard* v. *Consett Iron Co.* (4) seems to me to shew that the county court judge was wrong in the decision at which he arrived in the present case; because when one regards the facts of the case which have been stated, and his decision which is expressed in the words which I will refer to, it seems he has, to use a phrase commonly used in these cases, misdirected himself

(1) [1907] A. C. 139.
(2) See note (3), ante, p.425.
(3) 6 F. 992.
(4) [1905] 2 K. B. 869.

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upon the way in which he should approach the consideration of this case. He says: "I have come to the conclusion that it would be absolutely impossible for me really to hold that this lady at the time of the death of the workman was dependent upon his earnings. To hold that would be holding in my opinion that to be a fact which is not a fact—to hold that which really is untrue." I think it is almost demonstrated by the arguments which we have heard that in arriving at that conclusion he has omitted to consider the legal presumption arising from the relationship in the case of husband and wife; and, if that is omitted from his consideration, and he has not applied his mind to the case on that basis, it is quite clear that the decision cannot stand. I agree with what the Master of the Rolls has said in reference to that.

The question with regard to which I have felt rather more difficulty is whether this appeal can be allowed so as to give in this Court a decision in favour of the applicant on the main question of dependency. That, I think, raises some little difficulty, although that difficulty is again, I think, disposed of by the course taken in *Stanland's Case*. (1) In order to express myself with respect to the way in which that can be done, let me say that legally and logically it seems to me to be this: If we start with the presumption, in a case of this kind, which has already been indicated, it must be necessary in the case then to proceed to consider whether there is any evidence of any facts upon which that presumption can be rebutted. The Master of the Rolls has stated the various points which might possibly come into consideration in such a matter, and he has shewn, I think, that there is in fact in this case no evidence of any facts upon which that presumption could be rebutted. I do not think it is necessary to follow out what Mr. Ruegg has indicated, that the Court will be led into difficulties by adopting such a conclusion, because it is not necessary to say what facts in every case will rebut that presumption. There is an indication possibly which I find in Romer L.J.'s judgment in the case of *Coulthard* v. *Consett Iron Co.* (2), which I only suggest as one case—there may be others—where he says this: "I think it might be

(1) See note (3), ante, p. 425. (2) [1905] 2 K. B. 869.

so inferred, unless there were other circumstances sufficient to justify the conclusion that she "—that is, the wife—" had ceased to look to her husband's earnings for maintenance." I think it would be dangerous and difficult to state exhaustively all the cases in which there would be evidence; but this case seems to me to be one in which it is not reasonable to say that there is evidence upon which the presumption could be reasonably held to be rebutted; and on that ground it legally and logically follows that the judgment can be dealt with in this Court.

I have nothing to add to what the Master of the Rolls has said upon the point as to the posthumous child. I agree with what he said upon that point.

KENNEDY L.J. I agree with the decision which has already been announced by the Master of the Rolls and the President; and I have, in consequence of the very full statement of the Master of the Rolls, and the reasoning on which his judgment proceeds, very little to add.

It seems to me that in this case the learned county court judge has clearly done two things erroneously. He has, in the first place, altogether left out of sight the presumption which upon authority, and I think upon reason too, ought to have been regarded when the relationship of the claimant to the deceased was found to be that of wife and husband, without any desertion, and without the intervention of any legal or actual circumstance to prevent their being treated as husband and wife in the fullest sense of that relationship. In the next place, as I read the judgment, the learned county court judge has arrived at his conclusion on the erroneous assumption that the question of dependency turned upon the absence of actual support by the husband at the time of his death. He said it was impossible for him to find that there was dependency under the Act, because in fact the wife was not in any way receiving support from her husband. That seems to me to be wrong. There have been several decided cases in point; and in one of the cases for years there had been no actual support. The view that proof of actual support at the time of the husband's death is necessary seems to me, with great respect to the learned judge, a mistaken view.

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Then, upon reading the rest of the judgment, I do not think that we ought to send the case back to him. I think we must regard the judgment as proceeding upon a state of things which does not disclose any ground for rebutting the presumption which ought to have been considered in the first instance as sufficient; and therefore we must come to the conclusion, in accordance with the view taken by this Court in the earlier case of *Stanland* v. *North Eastern Steel Co., Ld.* (1), that the undisputed facts do not shew anything which can justify a judicial decision contrary to that which the relationship of the parties otherwise would lead the Court to infer. For that reason it seems to me that we are doing right in not sending the case back, except of course so far as it may be necessary for the purpose of apportionment. Seeing the great pains that the county court judge took in giving his judgment, if he had thought he was entitled upon the evidence to say that these parties meant to live separately, that the husband meant not to give his wife any assistance by way of support, and that the wife either expressly or impliedly agreed to that, I think that he would have stated such an important finding.

As to the posthumous child, I think there is nothing more to be said. Mr. Ruegg did not argue the point. I may mention in addition to the recent decision of *Villar* v. *Gilbey* (2), the kindred case *The George and Richard* (3) where Sir Robert Phillimore, for reasons there stated, protected the interests of a child en ventre sa mère as a claimant under Lord Campbell's Act.

COZENS-HARDY M.R. The order will be that the respondents pay the money into Court to abide the learned county court judge's apportionment.

Appeal allowed.

Solicitors: *Smith, Rundle & Dobbs, for Morgan, Bruce & Nicholls, Pontypridd; H. P. Becker, for C. & W. Kenshole, Aberdare.*

(1) See note (3), ante, p. 425. (2) [1907] A. C. 139.
(3) (1871) L. R. 3 A. & E. 466.

G. A. S.

[IN THE COURT OF APPEAL.]

WILLIAMS *v.* VAUXHALL COLLIERY COMPANY, LIMITED.

C. A. 1907 *June* 7.

Employer and Workman—Compensation—Agreement out of Court—Weekly Payments—Return of Workman to Work—Abandonment of Right to further Compensation—Death resulting from Accident—Claim by Dependants—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 1 (*a*) (*i.*).

A workman who was injured by an accident arising out of and in the course of his employment within the Workmen's Compensation Act, 1897, made an arrangement with his employer out of Court whereby he received for a certain time after the accident a weekly payment, and then, believing himself to have recovered, returned to work, nothing being said on either side as to the continuance or cessation of the compensation, and he subsequently died from the effects of the accident:—

Held—(1.) that these facts afforded no evidence that the workman had abandoned his right against the employer to further compensation; (2.) that, assuming that the workman had abandoned his right, his dependants had a separate right to compensation of which the workman could not deprive them, subject to this, that the employer was not bound to pay in the aggregate more than the maximum compensation allowed by the Act, and was entitled to take credit for the sums advanced to the workman by way of weekly payment.

Appeal from an award of the county court judge sitting at Wrexham, as an arbitrator under the Workmen's Compensation Act, 1897.

The applicant was the widow of a man named Williams, who was a collier in the employment of the respondents. On September 3, 1904, he received a serious injury to his arm by an accident arising out of and in the course of his employment. He did not come to the Court for compensation, but made an arrangement whereby he received from the respondents half his weekly earnings during the time he was laid up. He made a fair recovery, and was anxious to return to his work. He did so twelve months after the accident, and nothing was said on either side about continuing the compensation or the cessation of the same. He did not go back to his old work, which was that of a coal-cutter, as there was no vacancy for him, but worked on the air ways underground. His earnings, however,

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were rather more after the accident than they were before. He complained frequently of the after-effects of the accident. He worked up to July, 1906, and died in the Denbigh Asylum on September 23 in the same year from acute mania. The widow applied for compensation on behalf of herself and three children as being dependants under clause 1 (*a*) (i.) of the First Schedule to the Act. The learned county court judge found, first, that the accident was responsible for the man's death; secondly, that the work which the man did after he resumed his employment was not work of such a character as to lead his Honour to conclude from the conduct of the parties that the respondents continued their liability to pay compensation within the meaning of the Act. The man having made his own arrangement with his employers, the learned judge thought it would be straining the law too far to say that there was any understanding between the parties that the liability should continue over the twelve months that the man worked after the accident. He accordingly made his award in favour of the respondents. The applicant appealed.

Ruegg, *K.C.*, and *Clement Edwards*, for the applicant. The county court judge has held that the remedy of the dependants is barred by reason of a presumed release by the workman of his right to compensation from the fact of his going back to work, but, first, there is no evidence of any implied agreement that no further compensation should be paid; and, secondly, assuming that there was such an agreement, that would not bind the dependants.

[They were stopped.]

Ellis Hill, for the respondents. The fact that the workman gave up the weekly allowance and went back to work for a considerable time is sufficient evidence to justify the judge in finding that there was an implied release by the workman of his right to any further compensation: *Bradbury* v. *Bedworth Coal and Iron Co.* (1); *Nicholson* v. *Piper* (2); and if the workman's right to further compensation is gone, the right of the dependants ceases also. The policy of the Act is to make the right of the dependants conditional on the existence of a right in the workman at

(1) (1900) 2 Minton-Senhouse, 138. (2) (1906) 76 L. J. (K.B.) 230.

the date of his death. By clause 1 (*a*) of the First Schedule the amount of any weekly payments is to be deducted from the sum payable to the dependants, and by clause 13 where any weekly payment has been continued for six months the liability therefor may on the application of the employers be redeemed by payment of a lump sum. It cannot have been intended that after such redemption the dependants should have any right to receive further compensation. So, where a scheme is settled under s. 3 of the Act the employer is under no further liability: *Taylor* v. *Hamstead Colliery Co.* (1) Further, to entitle the dependants to compensation they must be dependant on the earnings of the workman at the time of his death, and in this case at the time of his death and for some time previously the workman was earning nothing.

[COZENS-HARDY M.R. To hold that the right of the dependants was lost on that ground would be putting a very narrow construction upon the Act.

Ruegg, K.C. In the Act of 1906 the words "at the time of his death" are omitted.]

Ruegg, K.C., in reply.

COZENS-HARDY M.R. In my opinion this appeal must be allowed. The case raises two points, both of which are of some importance. The first point is this: A workman who was injured by an accident arising out of and in the course of his employment receives for a certain time after the accident a weekly payment by agreement, apart from any order of the Court, and then, thinking himself recovered, goes back to work, and not a word is said either by the workman or by the employer leading to any suggestion that there was an agreement that no further payment or compensation should be made. Do these facts afford any evidence of an implied release by the workman of his right to further compensation? The learned county court judge has held as an inference of law that the going back to work on these terms was an abandonment by the workman of his rights against the employer. He thought that it was necessary for the workman to say in terms that he did not release his

(1) [1904] 1 K. B. 838.

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right to further compensation. For that view I am bound to say that I can see no foundation in reason. The evidence is all one way. Neither the employer nor the workman said a word about further compensation, and under these circumstances it seems to me plain that the learned county court judge was not justified in finding that there was an abandonment by the workman of his rights. That alone is sufficient to dispose of this case; but, as the further point has been taken that the dependants of a workman have no separate right to compensation, I wish to express my opinion that under this Act the dependants have a separate and independent right in the event of the workman's death in such circumstances—a right which the workman cannot deprive them of except in this sense, that the Act contemplates that the employer is not from first to last bound to pay more than the maximum compensation given by the Act, and is entitled to take credit for any sums advanced by way of weekly payments. The point does not arise in the present case, but I think that in the case of the commutation or redemption of a weekly payment under clause 13 of the First Schedule to the Act it would be reasonable for the Court to hold that the amount paid in commutation is an amount for which the employer would be entitled to take credit, it being a sum to be deducted from the maximum. On both points the appeal must be allowed.

SIR GORELL BARNES, PRESIDENT, and KENNEDY L.J. concurred.

Appeal allowed.

Solicitors: *Holloway, Blount & Duke, for J. Downes-Powell, Wrexham; Watson, Sons & Room, for Peace & Ellis, Wigan.*

H. B. H.

JOHNSON *v.* PICKERING; NORTON, CLAIMANT.

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April 27; *June* 3.

Sheriff—Bankruptcy of Judgment Debtor—Execution under Writ of fi. fa.—Title of Execution Creditor to Money received by Judgment Debtor after entrance of Sheriff into Possession—Absence of overt act by Sheriff of Seizure of Money—Judgments Act, 1838 (1 & 2 *Vict. c.* 110), *s.* 12.

Under a writ of fi. fa. issued against a judgment debtor the sheriff seized all the goods in his house. After the seizure by the sheriff the debtor received certain moneys, and while the sheriff was still in possession of his goods at his house, but without the sheriff's knowledge, deposited 395*l.* in bank-notes (the balance of the moneys so received by him after making certain payments) in a drawer in his bedroom at the house. Subsequently the debtor died, and an order was made under s. 125 of the Bankruptcy Act, 1883, for the administration of his estate. As he was unaware of its existence, the sheriff did no overt act of seizing and taking the 395*l.* :—

Held that, if the 395*l.* had been in the debtor's house at the date of the seizure of his goods there by the sheriff, the effect of the sheriff's act on that date would have been to put him in the position of having seized and taken the money within the meaning of s. 12 of the Judgments Act, 1838; and that the overt act of the sheriff at the date of the seizure shewing an intention to seize and take all the goods in the house, coupled with the continuing intention to remain in possession of all goods answering that description, was enough to constitute a seizing and taking of goods not in the house at the date of the seizure but brought there before he withdrew from possession, and that the money was therefore not the property of the trustee under the administration order as against the execution creditor.

FURTHER consideration of an interpleader issue tried before Lawrance J. upon the following agreed statement of facts:—

On September 19, 1906, Johnson, the execution creditor, obtained judgment against Pickering for 9542*l.* 7*s.* and 5*l.* 6*s.* costs.

On November 12, 1906, a writ of fi. fa. was delivered to the Sheriff of Yorkshire, and on November 13, 1906, the sheriff, in the execution of the writ, went into possession at Heathfield Garforth, the residence of Pickering, the judgment debtor, and seized the goods of Pickering then in and upon the premises.

On November 14, 1906, the judgment debtor received at Wakefield about 400*l.*, proceeds of some sheep belonging to and sold by him on that day at Wakefield Market, and also the sum

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of 210*l.*, the proceeds of a cheque drawn by him on his account with the Lancashire and Yorkshire Bank, which cheque was cashed and the proceeds handed to the judgment debtor on November 14, 1906, by his secretary. The sheep were not at Heathfield at or after the time when the sheriff went into possession. The judgment debtor, after making certain payments, placed 395*l.* in notes, balance of the said moneys, in a drawer in his bedroom at Heathfield on his return there. The judgment debtor died suddenly on November 21, 1906. After the death of the judgment debtor his widow discovered the 395*l.* in the drawer, and on November 22, 1906, took the same to Messrs. Ford & Warren, her solicitors and the solicitors of her late husband, without the knowledge of the sheriff's officer who was in possession at the house.

On December 14, 1906, an order was made under s. 125 of the Bankruptcy Act, 1883, for the administration of the estate of the judgment debtor in bankruptcy on a creditor's petition presented on November 22, 1906, and on December 27, 1906, the claimant Norton was appointed trustee under the order, and his appointment was duly certified by the Board of Trade on December 31, 1906.

The sheriff went out of possession at Heathfield Garforth on December 12, 1906, having then realized and sold the furniture and effects therein.

Messrs. Ford & Warren now held the 395*l.* to abide the order of the Court herein.

On its coming to the knowledge of the sheriff that the 395*l.* was in the hands of Messrs. Ford & Warren he took out the interpleader summons, on which an order was made on January 24, 1907, that, Messrs. Ford & Warren agreeing to hold the 395*l.* in their hands to abide further order, the parties should proceed to the trial of an issue in the High Court .(to be prepared by the plaintiff and returned by the defendant), in which the claimant Norton should be plaintiff and Johnson, the execution creditor, defendant, and that the question to be tried should be whether the sum of 395*l.* in the hands of Messrs. Ford & Warren was the property of the claimant as against the execution creditor.

In the interpleader issue the plaintiff affirmed, and the defendant denied, that the 395*l.* was the property of the plaintiff as trustee under the administration order under s. 125 of the Bankruptcy Act, 1883, of the estate of Pickering, deceased (the judgment debtor), as against the execution creditor, the defendant.

E. Tindal Atkinson, K.C., and *Longstaffe*, for the trustee. In order to give an execution creditor title to the goods the sheriff, in executing a writ of fi. fa., must actually seize them. Money was not subject to seizure under a writ of fi. fa. until the enactment of s. 12 of the Judgments Act, 1838 (1), which provides that money must be seized and taken by the sheriff: *Collingridge* v. *Paxton*. (2) At common law all goods were bound by a writ of fi. fa. from the date of the teste of the writ, or, speaking strictly, from the first day of the term in which the writ was tested; but by s. 16 of the Statute of Frauds (29 Car. 2, c. 3) they were bound from the time of the delivery of the writ to the sheriff. But the title to money can only be acquired under the Judgments Act, 1838. In the present case, under s. 125 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), the property of the debtor vested absolutely in the official receiver of the Court as trustee. Inasmuch as the money has not been seized, and under s. 12 of the Judgments Act, 1838, the delivery of the writ to the sheriff does not bind money as it would goods, this money belongs to the plaintiff as trustee of the deceased debtor's estate.

H. T. Kemp, K.C., *E. Shortt*, and *L. G. Hoare*, for the execution creditor. In order to establish the title of the execution creditor to this money, actual seizure of it by the sheriff was not necessary so long as there was a right to seize, i.e., so long as the goods and money of the judgment debtor were in law seizable, they were bound by the entry of the sheriff into the house, and it is clear that the title of the execution creditor could not be

(1) Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 12: "And be it enacted, That by virtue of any writ of fieri facias to be sued out of any superior or inferior Court after the time appointed for the commencement of this Act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank-notes . . . ."

(2) (1851) 21 L. J. (C.P.) 39.

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defeated by the removal of the money from the house while the sheriff was in possession. The effect of s. 12 of the Judgments Act, 1838, was that money became seizable by the sheriff in the same manner as goods always had been. After the seizure, the judgment debtor could not retain the bank-notes as against the execution creditor, and it follows that no one else could: *Gladstone* v. *Padwick*. (1) The crucial test is not whether the bank-notes were actually seized, but whether the sheriff had the right to seize them. The sheriff had the right to seize the notes when they were put into the drawer by the judgment debtor, and their subsequent removal from the house could not prejudice that right, which was prior in date to the appointment of the plaintiff as trustee: *Ex parte Williams, In re Davies*. (2) Sect. 16 of the Statute of Frauds took away to some extent the right of the execution creditor to the goods, because it provided that the property in the goods was not bound until the delivery of the writ to the sheriff, instead of from the date of the teste of the writ. The Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1, provided that the goods should not be bound until seizure as against a person acquiring a title to them bona fide and for value unless he had notice that the writ had been delivered to the sheriff. The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 26), repealed s. 16 of the Statute of Frauds, but re-enacted it with some slight alterations. The Act of 1893 also repealed s. 1 of the Mercantile Law Amendment Act, 1856. Sect. 26, sub-s. 1, of the Sale of Goods Act, 1893, gave back to the execution creditor the right to which he had been deprived by s. 1 of the Mercantile Law Amendment Act, 1856. By s. 62, sub-s. 1, of the Act of 1893, money is not included in the term "goods." It therefore follows that, if bank-notes are to be regarded as goods, the bank-notes are bound without any seizure as from the date of the delivery of the writ to the sheriff. If the bank-notes are not to be regarded as goods they were seizeable, as at common law, under s. 12 of the Judgments Act, 1838, and were bound from the teste of the writ. *Hasluck* v. *Clark* (3) shews that under s. 125 of the Bankruptcy Act, 1883, the property of the deceased debtor only vests in the

(1) (1871) L. R. 6 Ex. 203. (2) (1872) L. R. 7 Ch. 314.
(3) [1899] 1 Q. B. 699.

official receiver subject to the right of the execution creditor. It is true that in that case there was a definite seizure of the goods, but the principle upon which the decision was based applies to the present case. It is clear that in order to establish the right of the execution creditor to the property of the judgment debtor seizure by the sheriff is not necessary: *Day* v. *Carr* (1); *Lea* v. *Rossi*. (2) If the bank-notes are not goods within the meaning of the Sale of Goods Act, 1893, they were bound, as at common law, from the teste of the writ. Further, what took place amounted to a seizure, because there was an intention of the sheriff to execute the writ: *Balls* v. *Thick*. (3) [*Woodland* v. *Fuller* (4) was also referred to.]

Tindal Atkinson, K.C., in reply. It is admitted that seizure by the sheriff is not necessary in order to establish the right of the execution creditor so far as goods are concerned, but the question is whether that proposition is applicable to money. There is no authority which shews that money is bound from the delivery of the writ to the sheriff. When the sheriff entered the house he did not seize the money, and was therefore not in possession of it. Although goods were bound by the teste of the writ, at common law money was not. It is not "goods" within the meaning of the Sale of Goods Act, 1893; for the definition of that word contained in the Act expressly excludes it.

Cur. adv. vult.

June 3. LAWRANCE J. read the following judgment:—The facts in this case are not in dispute. They are set out in the admitted statement, and I do not propose to recite them further than is necessary to explain the reasons for the conclusions at which I have arrived.

On December 14, 1906, an order for the administration of the estate of the deceased debtor was made on a creditor's petition under s. 125 of the Bankruptcy Act, 1883. The effect of that order was, by sub-s. 5 of s. 125, that the property of the debtor vested in the official receiver of the Court

(1) (1852) 7 Ex. 883.
(2) (1855) 24 L. J. (Ex.) 280.
(3) (1845) 9 Jur. 304.
(4) (1840) 11 A. & E. 859.

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as trustee thereof, whose duty it was forthwith to proceed to realize and distribute the same in accordance with the provisions of the Act.

The question is whether a sum of 395*l.* now representing two sums of 400*l.* and 210*l.* respectively formed part of the debtor's estate as against the execution creditor on December 14, 1906.

As to the sum of 400*l.*, that represented the proceeds of the sale of certain sheep sold by the debtor on November 14. The sum of 210*l.* consisted of bank-notes drawn out by the debtor from his bankers on the same date. Before these sums had been received by the debtor a writ of fi. fa. had been issued against him, and the sheriff had seized all his goods in his house called Heathfield. After this seizure, and while the sheriff was in possession of the debtor's goods at Heathfield, the debtor, after having made certain payments, had deposited the balance, 395*l.*, in a drawer in his bedroom at Heathfield. What subsequently happened to this money does not affect the rights of the parties to this issue. As a matter of fact, on November 22, after the death of the debtor (who died on November 21), and while the sheriff was still in possession of the goods which he had seized at Heathfield, it was found by the debtor's widow, and by her placed in the hands of her solicitors, who now hold it for the party who may be entitled to it.

Now at common law the writ of fi. fa. commanded the sheriff "to make of the goods and chattels" of the debtor the sum recovered, which was understood to mean "by sale"; consequently money could not be taken, because it was not saleable; nor could a bill of exchange or other valuable security: see Lush's Practice, 3rd ed. vol. 2, p. 595. As to other goods and chattels, until the Statute of Frauds they were bound, in case a writ of fi. fa. had been issued, from the date of the teste of the writ, or rather from the first day of the term in which the writ was tested—that is to say, that after that date the goods of the debtor could only be assigned by him subject to the right of the execution creditor or of the sheriff. By s. 16 of the Statute of Frauds it was enacted that no writ of fi. fa. should bind the property of the goods of the party against whom such writ was sued forth, but from the time that such writ should be delivered

to the sheriff or under-sheriff to be executed. This section of the Statute of Frauds did not affect money or other valuable securities, and has been repealed by s. 60 of the Sale of Goods Act, 1893, so that, except from a historical point of view, it is unnecessary to consider it.

Money and bank-notes were first made liable to be taken in execution by the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 12. By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1, it was enacted that no writ of fi. fa. against the goods of a debtor should prejudice the title to such goods acquired by any person bona fide and for valuable consideration before the actual seizure thereof by virtue of such writ, provided that such person had not, at the time when he acquired such title, notice that such writ had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner. This Act, which only affected purchasers of goods from the debtor, could not in any sense affect the present case. It has also been repealed by the Sale of Goods Act, 1893, and need not be further considered. The Sale of Goods Act itself does not apply to money or bank-notes; and the result is that the question in this case depends upon the effect of the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 12.

That section provides that by virtue of any writ of fi. fa. the sheriff or other officer having the execution thereof may and shall seize and take any money or bank-notes belonging to the person against whose effects such writ of fi. fa. shall be sued out, and may and shall pay or deliver to the party suing out such execution any money or bank-notes which shall be so seized, or a sufficient part thereof. The rest of the section applies to cheques, bills of exchange, bonds and other securities, and does not affect the present case. It is clear that if the sums of money and notes were not seized and taken by the sheriff under this statute they remained the property of the debtor and passed to the official receiver or trustee, the present claimant.

Now it is clear that a sheriff may seize goods and chattels without actually laying his hands upon them; it is sufficient if he enters upon land on which the goods and chattels are and announces his present intention of seizing all the goods and

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chattels upon that land: *Gladstone* v. *Padwick*. (1) The effect of such action on the part of the sheriff may be, and no doubt often is, to put him into possession of many things of the existence of which he is quite ignorant; and I have come to the conclusion that if these sums of money had been in the debtor's house on November 13 the effect of the sheriff's act on that date would have been to put him in the position of having seized and taken the money within the meaning of s. 12 of the Judgments Act, 1838.

In the present case, however, the money was not in the debtor's house when the sheriff seized, and was only brought there on the following day. The question arises whether that fact makes any difference. There can be no doubt that the sheriff intended throughout the whole period from November 13 to December 12 to hold possession of all that he could seize and take in the house, and that the only reason why he did no overt act of seizing and taking this money was because he was unaware of its existence. The tendency of modern authorities is to make an intention to possess the test, in the absence of more direct evidence, of actual possession: see *South Staffordshire Waterworks* v. *Sharman* (2); and in my view an overt act (on November 13) shewing an intention to seize and take all the goods in the house, coupled with a continuing intention to remain in possession of all goods answering that description, is enough to constitute a seizing and taking of goods not in the house at the date of the overt act, but brought there before the sheriff withdraws from possession. I think that, if an owner of goods deposits them in a desk in possession of a sheriff who is bound to seize goods of which the depositor is the owner, he places those goods in possession of the sheriff. Lord Russell C.J., in his judgment in *South Staffordshire Waterworks Co.* v. *Sharman* (2), indicates that the possession of a person does not depend upon the knowledge that he possesses, and cites the following passage from Pollock and Wright's essay on Possession, p. 41: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land; and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. . . . . It

(1) L. R. 6 Ex. 203.

(2) [1896] 2 Q. B. 44.

is free to anyone who requires a specific intention as part of de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession, constituted by the occupier's general power and intent to exclude unauthorized interference": see *South Staffordshire Waterworks Co.* v. *Sharman*. (1) There seems to be no reason why that which applies to land should not for this purpose apply to a chest or desk or personal chattel of a nature capable of containing other chattels. The sheriff had a power and intent to exclude unauthorized interference with the contents of the drawer containing the money in question; this would constitute possession whether he knew of the existence of the money or not. If he was in possession of the money, it cannot in my opinion be said that he had not in law seized and taken it under s. 12 of the Judgments Act, 1838. For these reasons I have come to the conclusion that this money is not the property of the plaintiff as trustee under the administration order as against the defendant.

Judgment for execution creditor.

Solicitors for the trustee: *Ward, Bowie & Co., for W. & E. H. Foster, Leeds.*

Solicitors for the execution creditor: *Burton, Yeates & Hart, for Luke White, Driffield.*

(1) [1896] 2 Q. B. 44.

J. E. A.

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Jan. 14;
Feb. 23;
May 7.

NEWTON, CHAMBERS & CO., LIMITED *v.* HALL.

Revenue—Redemption of Land Tax on Lands—Liability to Assessment of Coal Mines under redeemed Lands—Construction of Redemption Contract—Land Tax Act, 1797 (38 *Geo.* 3, *c.* 5), *s.* 4.

In contracts for the redemption of land tax the word "lands" must be construed as having its natural meaning, including everything down to the centre of the earth, unless at the time of redemption there is in existence a separate and distinct hereditament liable to be separately assessed; and, if there is such a separate hereditament, all the circumstances of the case existing at the time of redemption must be looked at in order to see whether the intention of the registered certificate was that the surface only should be redeemed or the land and everything beneath it.

As coal and the profit to be derived from mining are nothing but the natural production and profit of the land, unopened seams of coal under land belonging to the same owner, in respect of which the land tax is redeemed, are included in the redemption.

Special case stated by agreement of the parties pursuant to Order xxxiv., r. 1.

The plaintiffs Messrs. Newton, Chambers & Co., Limited, were the lessees of certain collieries in the township of Tankersley, in the county of York, known as the Rockingham Colliery, the Thorncliffe Colliery, and the Tankersley and Newbegin Collieries. The defendant was the collector of land tax for the township.

For the purposes of the action it was admitted by the defendant that by contract dated February 15, 1800, a certificate of which was registered at the Land Tax Redemption Office, the then Earl Fitzwilliam contracted for the redemption of the land tax charged upon various estates of which he was then tenant for life, including the estate situate in the said township of Tankersley, consisting of the manor or lordship of Tankersley, with all and every the seigniories, royalties, franchises, courts, perquisites and profits of courts, rents, suits, services, rights, members, privileges and appurtenances incident, belonging or appertaining to the said manor. Also the site of an ancient mansion called Tankersley Hall, with the park and demesne lands, outbuildings and appurtenances thereto belonging, then in the occupation of the said Earl Fitzwilliam. And also all those several messuages, tenements, cottages or dwelling-houses, farms, closes, inclosures,

pieces or parcels of arable, meadow, pasture and wood lands or grounds, containing, together with the said park and demesne lands, 1644 acres more or less, with all and every the rights, members, commons and appurtenances to the said premises respectively belonging as the same then or late were in the respective tenures or occupations of the several persons thereinafter mentioned, their undertenants or assigns. The said manor, mansion, messuages, tenements and lands comprised in and forming the subject of the said contract and certificate of redemption are hereinafter referred to as "the redeemed lands and hereditaments."

Subsequently to the date of the contract of redemption the collieries, of which the plaintiffs were lessees, were established, sunk, and opened, partly in the redeemed lands and hereditaments and partly in other lands and hereditaments. Since the collieries were so established they had been, and were now being, worked by the plaintiffs as lessees thereof, under divers leases dated respectively May 7, 1878, November 1, 1893, February 23, 1885, and March 4, 1886.

The collieries consisted of (1.) a considerable area of land, upon the surface of which all the engine-houses, machinery, headgear, coke ovens, and necessary plant for raising and manipulating the coal when raised were situate, and in which the shafts or pits for raising the coal were sunk vertically from the surface through the intervening strata down to the particular seams of coal which were being worked; (2.) seams of coals and underground workings, including underground roadways, airways, drifts and levels radiating in various directions from the bottom of the pits or shafts to the working faces in the coal seams from which the coal was got, and from which it was conveyed by such roadways to the bottom of the shafts and thence raised to the surface, where it was screened and made ready for sale, or converted into coke or otherwise dealt with; and (3.) the engines and machinery in the underground workings.

The whole of the surface works and all the vertical pits or shafts, and parts of the underground roads and levels and some of the working faces from which the coal was being hewn and gotten, were situate in, upon or under the redeemed lands and

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hereditaments, but some parts of the underground roads and levels, and some of the working faces from which the coal was being hewn and gotten, were situate in or under lands the tax on which had not been redeemed.

The plaintiffs having refused to pay the land tax imposed on the premises so occupied by them situate in, upon or under the redeemed lands and hereditaments, the defendant (acting pursuant to a warrant signed by the land tax commissioners for the Staincross division of the West Riding of the county of York) on March 28, 1906, entered upon the surface of the Rockingham and Tankersley Collieries and distrained upon the goods and chattels of the plaintiffs on the premises for the sum of 58*l.* 2*s.* 7*d.*, being the amount of the land tax assessed by the commissioners upon the collieries, and for 1*l.* 8*s.* 7*d.* for expenses of distress.

Before the assessments were made by the commissioners the plaintiffs attended before them and objected to being assessed in respect of their collieries and premises which were situate in, upon or under the redeemed lands and hereditaments. The commissioners admitted that they were not entitled to assess the colliery surface works and pits or shafts on and in the redeemed lands, but insisted on their right to assess the workings underground in the collieries, whether in redeemed lands or not.

The plaintiffs paid to the defendant the sums of 58*l.* 2*s.* 7*d.* and 1*l.* 8*s.* 7*d.* under protest, contending that the assessments were excessive and illegal in so far as they were made in respect of collieries and premises upon, under or in redeemed lands and hereditaments. The plaintiffs admitted that they were liable to be assessed to the land tax in respect of so much of their collieries, if any, as were in, upon or under lands and hereditaments the land tax upon which had not been redeemed.

For the purposes of the case it was admitted by the defendant that if the land tax on any land had been redeemed, the surface land and works thereon, and the vertical shafts sunk in such land, were exempt from land tax, and it was admitted by the plaintiffs that coal mines, or parts of coal mines, upon or under lands the land tax on which had not been redeemed were liable to be assessed to land tax.

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The question (among others not material to this report) for the opinion of the Court was, Were the plaintiffs liable to be assessed to and to pay land tax in respect of any portion of their collieries and works and premises which were in, upon or under lands and hereditaments the land tax upon which was redeemed by or in consequence of the contract of February 15, 1800?

Danckwerts, K.C., and *R. Cunningham Glen*, for the plaintiffs. The question is whether the commissioners are entitled to assess the underground workings. The land tax was levied under the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), the greater part of which was repealed, and substantially re-enacted so far as the present point is concerned, by the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116): *Reg.* v. *Tower Hamlets Commissioners*. (1) The decision in that case also shews that the effect of the Act of 1798 is to perpetuate the land tax, which had ceased to be made yearly, and to crystallize the quota raised from various unredeemed areas. In the present case the land tax was redeemed in 1800 under s. 8 of the Act of 1798. Sect. 8 of the Act of 1798 refers to s. 4 of the Land Tax Act, 1797 (38 Geo. 3, c. 5) (2), for the description of the "lands," &c., which might be redeemed. It has been consistently held (except that there is in *Metropolitan Ry. Co.* v. *Fowler* (3) a dictum of Lord Esher M.R. to the contrary) that redemption of surface of the land redeems the whole land, and that the interest in a coal mine under the land is therefore not taxable—e.g., where a manor was redeemed and subsequently the waste was utilized, no fresh land tax was imposed. But where a new subject-matter of assessment is created, e.g., a franchise, land tax is again imposed. It is immaterial that in the present case coal existed under the land at the time the land tax was redeemed: *New River Co.* v. *Land Tax Commissioners*

(1) (1853) 2 E. & B. 694.

(2) Land Tax Act, 1797 (38 Geo. 3, c. 5), s. 4: "All and every manors, messuages, lands, and tenements, and also all quarries, mines of coal, tin, and lead, ... and other mines . . . . and all hereditaments, of what nature or kind soever they be . . . . shall be charged with as much equality and indifference as is possible. . . . ."

(3) [1892] 1 Q. B. 165.

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for Hertford (1); *Hodgson* v. *Pearson* (2); *Gowan* v. *Christie* (3); *Campbell* v. *Wardlaw* (4); *Coltness Iron Co.* v. *Black* (5); *Lord Colchester* v. *Kewney* (6); *Westminster Corporation* v. *Johnson.* (7) Strictly speaking, there is no such thing as a lease of a coal mine; it is the grant of a liberty to take away part of the land.

In *Metropolitan Ry. Co.* v. *Fowler* (8) none of those decisions were referred to during the arguments. The concluding paragraph of the judgment of Lord Watson in the House of Lords in *Metropolitan Ry. Co.* v. *Fowler* (9) shews that the coal is part of the land. The land was assessed before redemption, and there is no separate subject-matter of taxation. All the authorities are in favour of the plaintiffs, with the exception of the dictum contained in the judgment of Lord Esher M.R. in *Metropolitan Ry. Co.* v. *Fowler* (8) with regard to the interest in a mine being taxable. That dictum is inconsistent with every decision. [*Vauxhall Bridge Co.* v. *Sawyer* (10), *Charing Cross Bridge Co.* v. *Mitchell* (11), and ss. 9, 17, and 95 of the Land Tax Perpetuation Act, 1798, were also referred to.]

C. A. Russell, K.C., and *Ryde*, for the defendant. The question is whether, having regard to the language of the particular redemption contract, the property is assessable to land tax. In *Hodgson* v. *Pearson* (2) Lush J. based his judgment on the particular redemption contract. In the present case the words in the contract referring to land tax do not cover coal mines unopened when the contract was made. In *Lord Colchester* v. *Kewney* (6) the question of the effect of redemption did not arise. When a mine is opened it ought to be assessed according to its value at the time of the assessment. Before it is opened the mine, although in existence, is not taxable. The expression "land" in s. 4 of the Land Tax Act, 1797, only includes the surface of the land. Mines are to be regarded as a separate hereditament. That is clear from the judgment of Lord Esher M.R. in *Metropolitan Ry. Co.* v. *Fowler*. (8) *Wilkinson* v.

(1) (1857) 2 H. & N. 129.
(2) (1874) 31 L. T. 679.
(3) (1873) L. R. 2 H. L. Sc. 273.
(4) (1883) 8 App. Cas. 641.
(5) (1881) 6 App. Cas. 315.
(6) (1866) L. R. 1 Ex. 368; (1867) L. R. 2 Ex. 253.
(7) [1904] 2 K. B. 737.
(8) [1892] 1 Q. B. 165.
(9) [1893] A. C. 416.
(10) (1851) 6 Ex. 504.
(11) (1855) 4 E. & B. 549.

Proud (1), *Lord Provost of Glasgow* v. *Farie* (2), and *Duke of Hamilton* v. *Graham* (3) are in the defendant's favour.

Sect. 4 of the Land Tax Act, 1797, is the section which has to be construed in order to determine the meaning of the redemption contract. "Lands" in that section means everything that land would mean in a conveyance except the things that are expressly mentioned in it: *New River Co.* v. *Land Tax Commissioners for Hertford.* (4) The word "lands" in the contract has the same meaning as in that section. The mine is a separate hereditament. The judgment of Lord Watson in the House of Lords in *Metropolitan Ry. Co.* v. *Fowler* (5) does not negative the proposition that redemption of the surface would not involve the redemption of the mine. [*Waterloo Bridge Co.* v. *Cull* (6); *Vauxhall Bridge Co.* v. *Sawyer* (7); *Westminster Corporation* v. *Fuller and Johnson* (8); Bythewood and Jarman on Conveyancing, 4th ed. vol. 5, p. 530 (Conveyance of Mines); and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), were also referred to.]

Glen, in reply. Every hereditament of every kind is mentioned in s. 4 of the Land Tax Act, 1797. In the toll cases the ratio decidendi was that a thing which could not have existed before the redemption had come into existence. Redemption means redemption from liability to taxation. A toll being a distinct hereditament, the redemption of the land does not redeem the toll; but coal mines are not distinct from the land. [The Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 5, was also referred to.]

Cur. adv. vult.

May 7. BRAY J. read the following judgment:—The question raised in this special case is whether the plaintiffs are liable to be assessed to and to pay land tax in respect of so much of their collieries and works as lie upon, in or under lands the land tax upon which had been previously redeemed. The contract for redemption was contained in a certificate dated

(1) (1843) 11 M. & W. 33.
(2) (1888) 13 App. Cas. 657.
(3) (1871) L. R. 2 H. L. Sc. 166.
(4) 2 H. & N. 129.
(5) [1893] A. C. 416.
(6) (1858) 1 E. & E. 213.
(7) 6 Ex. 504.
(8) [1904] 2 K. B. 737.

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February 15, 1800, and the language of the certificate is stated with sufficient accuracy in the special case in these words: "The Right Honourable William Wentworth Earl Fitzwilliam contracted for the redemption of the land tax charged upon various estates of which he was then tenant for life, including the estate situate in the said township of Tankersley, consisting of the manor or lordship of Tankersley, with all and every the seigniories, royalties, franchises, courts, perquisites and profits of courts, rents, suits, services, rights, members, privileges and appurtenances incident, belonging or appertaining to the said manor. Also the site of an ancient mansion called Tankersley Hall, with the park and demesne lands, outbuildings and appurtenances thereto belonging, then in the occupation of the said Earl Fitzwilliam." Now come the more important words: "And also all those several messuages, tenements, cottages or dwelling-houses, farms, closes, inclosures, pieces or parcels of arable, meadow, pasture and wood lands or grounds, containing, together with the said park and demesne lands, 1644 acres more or less, with all and every the rights, members, commons and appurtenances to the said premises respectively belonging as the same then or late were in the respective tenures or occupation of the several persons thereinafter mentioned, their undertenants or assigns." I have to construe this certificate. It is conceded that according to their natural construction, and read apart from the provisions of the Land Tax Acts, these words import that not only the surface of the 1644 acres, but everything upon and underneath them, was released from land tax; but it is said, and I think rightly, that in order to ascertain the true meaning I must look at the provisions of the Land Tax Acts. This land tax was redeemed under the Land Tax Perpetuation Act, 1798 (38 Geo. 3, c. 60), an Act the greater part of which was repealed by the Land Tax Redemption Act, 1802 (42 Geo. 3, c. 116), which took its place, but there is no substantial difference between the two Acts so far as the point which I have to consider is concerned. The section of the first-named Act authorizing redemption is s. 8, which enables the commissioners to agree with all persons having or holding any manors, messuages, lands, tenements, or hereditaments described

in an Act of the same session, the Land Tax Act, 1797 (38 Geo. 3, c. 5), for the redemption of the land tax charged upon their respective manors, messuages, lands, tenements or hereditaments aforesaid, according to the assessment and rate made or to be made in pursuance of the Land Tax Act, 1797. Then follow sections providing for certificates, contracts and receipts, and by s. 17 it is provided that, upon the registry or entry of such certificates, contracts and receipts, the said manors, messuages, lands, tenements and hereditaments comprised in such contract shall thenceforth be wholly freed and exonerated from the land tax charged thereon and all further assessments thereof.

It will be seen that by s. 8 of the Land Tax Perpetuation Act, 1798, reference is made to the Land Tax Act, 1797, for the description of the manors, messuages, &c. This description is to be found in s. 4 of that Act, and this, therefore, is the section which has to be construed, and the contention of the defendant is shortly this, that, "mines" being specially mentioned as subject to be assessed for land tax, they are something different from lands, and the land tax on them is not redeemed by a contract which does not specially mention them. The Act being now over one hundred years old, it is to be expected that there should be many authorities bearing upon its construction, and it will be convenient to first examine these authorities. The first two authorities to be examined are *Vauxhall Bridge Co.* v. *Sawyer* (1) and *Charing Cross Bridge Co.* v. *Mitchell.* (2) In both these cases the question to be decided was whether the companies were liable to be assessed for land tax in respect of the tolls levied under the Acts of Parliament which authorized the construction of these bridges. In the first of these cases no question of redemption arose, and it was held that the tolls were liable to be assessed as being a tenement or hereditament within the meaning of the Act. In the second case the owner of the soil had, previous to the erection of the bridge, redeemed the land tax in respect of the land on which the piers stood, but it was held, nevertheless, that the company owning the tolls were liable to be assessed, and the reason given is important, namely, that where the Legislature confers a right to take tolls, a new profit and a new hereditament

(1) 6 Ex. 504. (2) 4 E. & B. 549.

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are created; the tolls are distinct from the land. Having regard to the reason given, I do not think these cases bear on the point now under consideration, as it cannot be said that any new hereditament has been created. The next case is *New River Co.* v. *Land Tax Commissioners for Hertford.* (1) Amongst other points the Court had there to decide whether the company could be assessed to land tax in respect of wells under land the land tax in respect of which had been redeemed. *Charing Cross Bridge Co.* v. *Mitchell* (2) and *Vauxhall Bridge Co.* v. *Sawyer* (3) were cited in argument in favour of the commissioners. The Court took time to consider its judgment, which was given by Pollock C.B., and with reference to this point he says: "Assuming . . . . that the land tax has been redeemed, we think the governor and company are not liable in respect of the springs, as we consider the redemption relieves the land and all its natural production and profits from further tax, although it may be that it was not known at the time of the redemption that they existed. The case of *Charing Cross Bridge Co.* v. *Mitchell* (2) is clearly distinguishable. The hereditament there was an entirely new one, created by an Act of Parliament, and not any part of the natural production and profit of the soil." It is no doubt true that that case might be distinguished from the present on the ground that it did not appear that the springs or wells constituted a separate and distinct hereditament, but the ratio decidendi was that redemption relieves the land and all its natural production and profits from further tax, and this seems to cover the present case, as coal and the profit to be derived from mining are nothing but the natural production and profit of the land. They are just as much so as water or stone or anything else found under the surface. And this is so, said the learned Chief Baron, although it might be that it was not known at the time of the redemption that they existed. In *Lord Colchester* v. *Kewney* (4) the question arose whether land not exempt when the tax was made permanent would become exempt if it became Crown property. It was held that it would not, but

(1) 2 H. & N. 129.
(2) 4 E. & B. 549.
(3) 6 Ex. 504.
(4) L. R. 1 Ex. 368; L. R. 2 Ex. 253.

the judgments both in the Court of Exchequer and in the Exchequer Chamber contain several statements of the law which may be useful in considering the present case. Channell B., who delivered the judgment of the Court of Exchequer, says: "It was therefore the policy of the Legislature to encourage redemption"; and "any owner who was about to improve his land . . . . might be expected first to redeem the tax." In the Court above there is an elaborate judgment by Willes J., who says he must hold that the payment directed by the Act to be made must include every portion of the land tax then payable. "But there is no provision for the case of land, which, by changing its character and thus (as is contended) coming within the exception from the general taxation, might cease to produce anything." And with reference to the point that arose in argument whether mines and quarries which did not exist when the Act was passed were to be free from the tax when afterwards opened, he says: "The last case was that of mines and quarries, as to which I will only say, that mines and quarries are nothing more than land and the potential profit of land in existence at the time the Act was passed, and probably there will be no great difficulty in dealing with the case when it arises." In *Hodgson* v. *Pearson* (1) the question was raised whether when the land tax on a manor had been redeemed, and the waste was afterwards enclosed and brought into profitable occupation, such waste could be assessed for land tax. It was held that it could not. This case is of course distinguishable, but it is to be observed that in that case Keating J. said that it is to be taken more against the party granting the enfranchisement than the other what it is that the Crown means to enfranchise. I now come to the case of *Metropolitan Ry. Co.* v. *Fowler*. (2) The question raised in that case was whether the railway company, who had constructed a tunnel underneath a street, were liable to be assessed for land tax in respect of their interest in the tunnel. It was held by both Courts that the railway company were owners of a hereditament and were therefore liable. The land tax on the land constituting the street had never been redeemed, so that the case is not in point; but in argument in the Court of Appeal it was urged on

(1) 31 L. T. 679.

(2) [1892] 1 Q. B. 165; [1893] A. C. 416.

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behalf of the company that if they had owned the surface and had redeemed the land tax it would be making them pay land tax again if the tunnel was assessable. This argument was answered by all the judges, and it is contended on behalf of the defendant here that the answers given are entirely in his favour. It becomes necessary, therefore, to examine this closely. First, it is to be observed that no cases were cited on this point, and no reference at all is made in the argument or the judgment to *New River Co.* v. *Land Tax Commissioners for Hertford* (1), and it certainly was unnecessary to decide the point. Examining carefully the language of Lord Esher M.R., it does not appear to me to be at all clear that his answer is in favour of the defendant. He says: "If the land is in its ordinary normal condition, without any taxable interest below the surface, then it is quite true that when you redeem the surface you redeem the land to the centre; but, in my view, if there is a separate and independent interest in land, distinct from the mere land in its ordinary normal condition to the centre, then when you redeem the surface, you do not redeem that separate and distinct interest. By redeeming the surface you redeem the whole land only when it is in its ordinary normal condition as mere land." What does he mean by land being in its ordinary normal condition? Is it not in its ordinary normal condition when there is coal underneath? It is not in its ordinary normal condition when it has been opened up and become a colliery. Then also he seems to contemplate that the whole land is redeemed unless there is at the time of redemption a separate and independent interest. Then by redeeming the surface you do not redeem the separate and distinct interest. But in the present case the coal was merely part of the subsoil of the land itself, and there was no separate and independent interest at the time of redemption. But Lord Esher M.R. proceeds: "For instance, suppose there is a mine below the surface, it cannot be doubted but that the mine, by virtue of the express words of this Act, is a separate interest in land which is taxable, and that one person may be taxed for the surface and another for the mine. Suppose there is an undiscovered mine below the

(1) 2 H. & N. 129.

surface at the time when the owner of the surface redeems the land tax, does he redeem the land tax in respect of the mine? He may think that he does, but in truth and in fact you do not pay one shilling more on account of the depth of the land when you are redeeming the land tax to the centre. In my view, if an unknown and undiscovered mine is there, nevertheless when you redeem the land tax you only redeem so much of the land below the surface as is in its ordinary and normal condition, without any distinct interest being there, and you do not redeem in respect of any new and distinct interest which may afterwards arise." What does he mean by an undiscovered mine? Does he mean coal measures the existence of which has never been discovered; or does he mean a mine which has been worked at some time, but the existence of which was unknown at the time of redemption? If the latter is his meaning, then what Lord Esher M.R. says is certainly not in favour of the defendant's contention. If the former no doubt the dictum is in the defendant's favour. Lopes L.J. differed from the rest of the Court, and his judgment need not be very carefully examined. I am not sure what his views were upon the point I have to consider. I think the judgment of Kay L.J. must be taken to be in favour of the defendant's contention, but I am not sure that he had clearly in his mind the present case, where the land at the time of redemption was simply land, though no doubt land with valuable minerals under it. It is to be observed that he distinctly differs from Keating J. as to the canon of construction applicable. (1) In the House of Lords (2) the decision of the majority of the Court of Appeal was affirmed, their Lordships holding that the interest of the company in the tunnel was a hereditament. The same argument as to what would happen in the case of redemption was used by the learned counsel for the railway company, but it was only noticed in the judgment of Lord Watson. He certainly does not say anything which helps the defendant here, and Lord Herschell does not adopt the interpretation put by Kay L.J. on the meaning of the word "lands," &c. Under all the circumstances, and particularly having regard to the fact that no cases were cited

(1) [1892] 1 Q. B. 165, at p. 178. (2) [1893] A. C. 416.

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on the point, I think it would be extremely dangerous to treat the dicta of any of the learned judges in the Court of Appeal as of equal authority with the judgment of Pollock C.B. in the *New River Case* (1), and the balance of authority seems to me to be clearly on the side of the plaintiffs here. But, considering the words of s. 4 of the Land Tax Act, 1797, apart from authority I come to the same conclusion. First, in order to adopt the defendant's contention you have to cut down the ordinary and natural meaning of the words of the certificate and to construe them as meaning the surface only of the 1644 acres. There was but one hereditament here at the time of redemption. Surely it was intended that this hereditament should be redeemed from land tax like any other hereditament. It was, as Channell B. said, the policy of the Act to encourage redemption, and it was obviously intended that the owner might redeem before he expended money in improving the hereditament without the fear of the improvement being taxed. If he redeemed the land tax before he built his houses or his cellars, he could not be taxed in respect of either. Why should he be taxed after redemption on profits derived from the large expenditure of money in opening up the colliery? For the land tax, if now assessed, must be assessed on the profits of the hereditament as it now exists. Then how is the land tax to be redeemed on the coal, if the owner wishes to redeem before he commences to mine? If "mines of coal" include coal measures unworked and even undiscovered, then the coal measures must be capable of redemption like every other hereditament, because the redemption clause covers the same hereditaments as the taxing clause. How are the coal measures to be assessed, there being no annual profits at the time of redemption, and it being quite uncertain whether there ever will be? Counsel for the defendant could give me no answer to this inquiry. Then it is said that the word "lands" must be read as not including any of the subjects of taxation afterwards mentioned; but what about "woods and underwoods"? They cannot be separately redeemed. Then the words "mines of coal" are certainly not apt words to cover unopened coal measures, and if unopened coal measures are not included in

(1) 2 H. & N. 129.

"mines of coal" they must be included in the word "lands," and when the lands are redeemed the coal measures must be redeemed also. The word "quarries" is certainly wide enough to include chalk pits and gravel pits. When you have redeemed the land, are you to be liable again to land tax if you open a chalk pit or a gravel pit? Nor should the words of s. 17 of the Land Tax Perpetuation Act, 1798, now repealed by s. 38 of the Land Tax Redemption Act, 1802, be overlooked, which provides that the manors, messuages, lands, tenements and hereditaments or other property comprised in such contract shall thenceforth be wholly freed and exonerated from the land tax charged thereon and all further assessments thereof. It seems to me that you must construe the word "lands" in redemption contracts as having its natural meaning, including everything down to the centre of the earth, unless at the time of redemption there is in existence a separate and distinct hereditament liable to be separately assessed; and if there is such a separate hereditament, all the circumstances of the case existing at the time of redemption must be looked at in order to see whether the intention of the certificate was that the surface only should be redeemed, or the land and everything beneath it. In the result, therefore, I have come to the conclusion, both on reason and authority, that by the contract of February 15, 1800, there was released from land tax not only the surface of the 1644 acres, but everything upon and underneath them.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Bell, Brodrick & Gray, for Parker Rhodes & Co., Rotherham.*

Solicitors for defendant: *Warren, Murton & Miller, for Tyas & Son, Barnsley.*

J. E. A.

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1907

March 22, 23, 25; *May* 13.

[IN THE COURT OF APPEAL.]

NEWPORT UNION *v.* STEAD.
NEWPORT UNION *v.* GREEN.

Poor Rate—Rateable Value—Necessary Expense to command Rent—Rent-charges imposed for Protection of Land from the Sea—Parochial Assessment Act, 1836 (6 *& 7 Will.* 4, *c.* 96), *s.* 1.

In a district under the jurisdiction of commissioners of sewers rent-charges were imposed on certain lands for the maintenance of works necessary to protect the district from incursions of the sea. The rent-charges were imposed on some only of the lands in the district, though other lands were equally benefited by the protection works:—

Held (Vaughan Williams L.J. dissenting), that in arriving at the rateable value of the hereditaments which were subject to the burden of the rent-charges, the amount of those rent-charges could not be deducted as an expense necessary to maintain the property in a state to command the rent thereof within s. 1 of the Parochial Assessment Act, 1836.

Whether any other sum ought to be allowed by way of deduction, *quære.*

Reg. v. *Vange*, (1842) 3 Q. B. 242, followed.

Decision of Divisional Court, [1906] 2 K. B. 147, affirmed.

Appeal from the decision of a Divisional Court on cases stated by the quarter sessions of the county of Monmouth. (1)

The question for decision was whether, in ascertaining the rateable value of certain farms and lands situate in the level of the hundreds of Caldicot and Wentlooge, in the county of Monmouth, rent-charges imposed thereon for the maintenance of works necessary for protecting the district from incursions of the sea could be deducted.

The cases stated by quarter sessions are set out in detail in the report in the Court below. The portions material for the purposes of this report are as follows:—

Newport Union *v.* Stead.

Upon the hearing of an appeal by the respondent Stead against a rate made for the relief of the poor of the parish of Nash, Monmouthshire, the following facts were admitted or proved:—

Moorbarn Farm, in the parish of Nash, was the property of

(1) [1906] 2 K. B. 147.

the Provost and Fellows of Eton College, and at the time of the making and during the currency of the rate in question the respondent was the tenant under an agreement dated July 5, 1899, at the yearly rent of 250*l.* By that agreement the respondent agreed (inter alia) to pay all rates, taxes, and other charges except tithe rent-charge, land tax and landlord's property tax, and to keep the gates, fence-walls, culverts, drains and fences of every description in good repair and condition, and do all other works presentable and ordered from time to time to be done by the commissioners of sewers of the Caldicot Level (except the sea walls, bridges and gouts).

The farm was assessed to the poor rate at a gross estimated rental of 250*l.* (viz., 225*l.* for agricultural land and 25*l.* for buildings), and at the rateable value of 197*l.* for agricultural land and 22*l.* for buildings, and the respondent was rated at these respective sums in the poor rate in question.

Subsequently to the making of the rate the respondent gave notice of objection to the assessment committee against his assessment, which on January 18, 1905, was altered as follows: The gross value was continued at 250*l.*, but the rateable value of the land was reduced from 197*l.* to 191*l.*, and of the buildings from 22*l.* to 21*l.*

The respondent, being dissatisfied with this reduction, appealed to quarter sessions, upon the ground that, in arriving at the rateable value of the farm, not any or an insufficient deduction or allowance had been made in respect of the rent-charges payable in respect of the farm and other property within the level by the Provost and Fellows of Eton College, as owners of the farm and other property, to the commissioners of sewers of the level under the Caldicot and Wentlooge Level Act, 1884 (47 & 48 Vict. c. cxxxiii.).

The level was a district under the jurisdiction of the commissioners, and Moorbarn Farm was situated wholly within it. By virtue of the Caldicot and Wentlooge Level Act, Moorbarn Farm (together with the other property belonging to Eton College, also within the level) was subject to the following rent-charges payable annually by the College as the owners of the farm and other property to the commissioners, viz., a rent-charge

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of 260*l.* payable in respect of the provision and maintenance by the commissioners of the sea walls in the level, and a rent-charge of 20*l.* 8*s.* 7*d.* payable in respect of the maintenance by the commissioners of the reens and drainage of the lands in the level. The rent-charge of 260*l.* was not charged upon any particular parts of the farm and other property belonging to Eton College, but upon the whole thereof, and might be recovered by distress upon any part of the farm and other property or by action against the Provost and Fellows of Eton College as the owners. A portion of the rent-charge of 20*l.* 8*s.* 7*d.*, namely, the sum of 16*l.* 4*s.* 7*d.*, was specifically charged upon part of the farm.

Moorbarn Farm, or the greater part of it, lay at a lower level than Hill Farm (which was the subject of rating referred to in *Newport Union* v. *Green*, the second of the two cases), and the whole of Moorbarn Farm would be liable to inundation if there were defects in the sea walls or in certain portions of the reens or in Fisher's Gout, all of which works were maintainable by the commissioners.

The rent-charges of 260*l.* and 20*l.* 8*s.* 7*d.* respectively were paid and borne wholly by the College as owners of the property, and no part was borne by the respondent, and the rent-charges were not, nor was any part thereof, expended specifically upon and in respect of the respondent's farm, but they were expended by the commissioners partly in maintaining the sea walls and the reens and drainage works throughout the level generally, and partly in repayment of loans created under the authority of s. 27 of the Caldicot and Wentlooge Level Act, 1884.

(10.) During the ten years next preceding the passing of that Act the College, as owners of the lands before mentioned, expended 3826*l.* 8*s.* 1*d.* (being equivalent to an annual outlay of 382*l.* 12*s.* 9*d.*) upon the maintenance of sea walls and other defences upon their lands in order to protect them from inundation. Those defences were now maintained by the commissioners, and the College were relieved of all liability for the same.

(11.) Only certain portions of the lands within the level were liable to the payment of rent-charges to the commissioners, the remaining portions of the lands within the level being exempt

from all such rent-charges and from liability to contribute towards the cost of the works executed by the commissioners.

(12.) On the hearing of the appeal it was assumed, and accepted by the parties, that the fact that some of the lands within the level were exempt from rent-charges and liability was (as is recognized by the Act of 1884) due to those lands having, prior to the passing of that Act, been disposed of by the then owners freed and discharged from and indemnified against all liability to pay or contribute towards the cost of making and repairing sea walls and other defences and works for the protection and drainage of the level. The lands within the level which were not subject to any such rent-charge or liability, and in respect of which no contribution was made towards the expenditure incurred by the commissioners in repairing and maintaining the sea walls and reens and drainage of the level, were benefited by the said expenditure and works equally with and to the same extent as other lands within the level which were subject to the rent-charges. The sea walls in the level which were repaired and maintained by the commissioners out of the said rent-charges extended from eighteen to twenty miles in length.

No evidence was given as to the portion of the rent-charges which it was contended by the respondent ought to be deducted from the rateable value of the farm, but it was agreed that if the respondent's contention was correct, the assessment of the rateable value of the whole of the farm (land and buildings) should be reduced to 71*l.*

The quarter sessions held that the respondent was entitled to have a portion of the rent-charges, namely, 141*l.*, deducted from the rateable value of Moorbarn Farm, and they allowed the appeal to that extent.

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In this case the same question was raised as to the rating of Hill Farm, which is situate in the parish of Goldcliff, and is wholly within the level. The facts were substantially the same as in the other case, except that the buildings of the farm were free from floods, but the remainder of the land occupied by the respondent would be liable to inundation if there were defects in

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the sea walls which were maintained by the commissioners. The farm was not protected by many of the works maintained by the commissioners.

A portion of the rent-charge of 20*l.* 8*s.* 7*d.*, viz., the sum of 1*l.* 8*s.*, was specifically charged upon part of Hill Farm. In this case the quarter sessions held that the respondent was entitled to have a portion of the rent-charges deducted from the rateable value of the farm, and they allowed the appeal.

The question for the opinion of the Court in each case was whether the quarter sessions came to a correct determination in point of law.

The Divisional Court (Lord Alverstone C.J., Ridley and Darling JJ.) allowed the appeal, being of opinion that the particular deductions claimed were not authorized by law, and that the quarter sessions ought not to have deducted them in arriving at the rateable value.

The tenants, Stead and Green, appealed.

The appeal was heard on March 22, 23, and 25.

Macmorran, K.C., and *S. R. C. Bosanquet*, for the appellants. The rent-charges payable under the Act of 1884 represent the presumptive liability which the College were formerly under to repair the sea walls and other defences. They are charges incurred for the benefit of all the low-lying lands of the district, including the lands belonging to the College. In order to enable these two farms to command a rent as agricultural land, it is necessary that they should be protected from the inroads of the sea, and that these expenses should be incurred for that purpose. Consequently, in assessing the rateable value of the lands, these expenses ought to be deducted. But it is said that, because these charges protect other lands as well, therefore no deduction ought to be allowed, and *Reg.* v. *Inhabitants of Vange* (1) is relied on in support of that proposition. But the decision in that case, which has been much criticized, turned on the question whether there was any beneficial occupation of the land, and did not proceed on the view that the expenses sought to be deducted benefited other lands also; and, apart from that question, it is settled that the

(1) 3 Q. B. 242.

expense of maintaining a sea wall for the protection of land is an expense which ought to be deducted by the rating authority: *Reg.* v. *Hall Dare* (1); even though the expense is made chargeable by the Act of Parliament on the landlord: *Reg.* v. *Gainsborough Union* (2); *Reg.* v. *Smith.* (3) The standard of value adopted by the Legislature in the Parochial Assessments Act, 1836, is the value of the land to the owner on a particular footing, whether it is in his own occupation or let to a tenant: *Reg.* v. *Wells.* (4) Even if the full sum allowed by quarter sessions ought not to be deducted, some deduction ought to be made in respect of the cost of protecting these lands from the incursions of the sea.

[*Ryde* objected that this point was not open because, it was not taken before the Court of quarter sessions.

COZENS-HARDY M.R. We think that point is not open to you.]

Then, if the whole expense is to be borne by a particular farm it ought to be deducted, because it has to be incurred to protect that particular farm, and, if it is necessary to maintain that farm in a state to command the rent, it is immaterial that the expense also produces a benefit to other farms.

[*Rex* v. *Churchwardens, &c. of Sculcoates* (5) was also cited.]

Ryde and *Corner*, for the respondents. The fact that the rent-charge benefited other lands besides the lands charged prevents the charge from being allowed as a deduction: *Rex* v. *Commissioners of Sewers for the Tower Hamlets.* (6) There is a distinction between creating a pecuniary equivalent for an old charge and creating a new charge of the same nature as the extinguished charge; this statutory rent-charge is not a reproduction in a new form of a previously existing liability, but is a new charge arising under the statute payable perpetually whether the protection of the sea wall is hereafter required or not: *Blyth Harbour Commissioners* v. *Newsham.* (7) The character of the charge is therefore now entirely altered.

(1) (1864) 5 B. & S. 785.
(2) (1871) L. R. 7 Q. B. 64.
(3) (1885) 55 L. J. (M.C.) 49.
(4) (1867) L. R. 2 Q. B. 542, 547.
(5) (1810) 12 East, 40.
(6) (1829) 9 B. & C. 517.
(7) [1894] 2 Q. B. 293.

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[VAUGHAN WILLIAMS L.J. referred to *Reg.* v. *Hull Dock Co.* (1)]

The rent-charges are charged only upon the landlord, and are imposed for the general benefit of the whole of the lands within the level, and not for the exclusive benefit of those particular farms; they cannot, therefore, be deducted: *Reg.* v. *Vange.* (2) It makes no difference whether the owner enjoys the rent, or has to pay it away as interest to a mortgagee or for public purposes: *Mersey Docks* v. *Cameron.* (3)

The annual sum which an incumbent pays for the salary of a curate: *Reg.* v. *Sherford* (4); the expenses of the repairs of the chancel: *St. Asaph* v. *Llanrhaiadr-yr-Mochnant* (5); the charge imposed upon licensed premises: *Waddle* v. *Sunderland Union* (6), though necessarily payable by the owner, are not the subject of deduction for rating purposes. The fact that some neighbouring land of the same quality is not subject to this charge while this land is subject makes no difference; land subject to land tax and land on which land tax has been redeemed are still rated the same: *Rex* v. *Adames.* (7) The main question at issue here is whether *Reg.* v. *Vange* (2) can be supported: the principle of that case is correct, and applies here; these rent-charges would be payable just the same if the sea were to recede and no further danger existed, and an incumbrance of this kind is not relevant in determining rateable value.

The cases relied on by the appellants were cases in which the rate in question was treated as a sewers tax. The system approved by the Divisional Court is the one that has been adopted for many years, and, as was said in *London County Council* v. *Churchwardens, &c. of Erith* (8), the law as established by past decisions ought not lightly to be unsettled. The Court is only asked to accept the law as settled by *Reg.* v. *Vange* (2) since 1842.

Macmorran, K.C., in reply. The Act of 1884 has not really altered the character of the payment which the owner of the land had to make, though it may have altered the annual amount.

(1) (1845) 7 Q. B. 2.
(2) 3 Q. B. 242.
(3) (1864) 11 H. L. C. 443.
(4) (1867) L. R. 2 Q. B. 503.
(5) [1897] 1 Q. B. 511.
(6) [1906] 2 K. B. 899.
(7) (1832) 4 B. & Ad. 61, at p. 68.
(8) [1893] A. C. 562, at p. 599.

What this land now bears is for the benefit of the particular farm, and none the less so because neighbouring farms are also benefited. Therefore the amount can be deducted, as it is for the benefit of the land that is being assessed; it is an expenditure necessary to protect this particular land.

Blyth Harbour Commissioners v. *Newsham* (1), when examined, has no bearing on the present case. The analogy of the land tax does not apply: land tax never has been the subject of deduction; it is not a payment necessary to put the property in a state to command a rent.

Cur. adv. vult.

May 13. COZENS-HARDY M.R. This appeal raises the question whether a deduction of a certain rent-charge ought to be made from the gross rateable value of the appellant's land in a level, under the jurisdiction of certain commissioners of sewers. The appellant is tenant of a farm belonging to Eton College. The buildings of the farm are situate upon a hill, and are free from floods, but the rest of the farm would be liable to inundation if it were not protected by the sea walls and other defences. The level extends for many miles, and considerable parts of the land within the level were not, in 1884, subject to any legal liability to maintain and repair any portion of the sea wall, the whole burden resting upon other lands within the level. The origin of this unequal distribution of the burden is not known. The appellant's farm is not free from this liability.

In 1884 the Caldicot and Wentlooge Level Act was passed (47 & 48 Vict. c. cxxxiii.), the main object of which sufficiently appears by the 1st and 2nd recitals: "And whereas various sea walls and other defences and works in the level are repairable by the owners of lands therein by reason of frontage to the sea ownership prescription custom tenure covenant or otherwise but by reason of neglect or want of unity of action and other causes the said repairs are insufficiently or improperly executed whereby the productive power of the soil is reduced and the security of the level in some cases endangered and it is expedient that the commissioners be authorized to require the owners

(1) [1894] 2 Q. B. 293.

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liable to execute such repairs to commute such their liability to the intent that the commissioners themselves should be enabled to provide for the execution of and to execute the necessary repairs and to make such new and additional works as they may from time to time deem expedient for the better protection and for the improvement of the drainage of the level. And whereas the owners of the lands specified in the first schedule to this Act and situate in the level who are or were liable as aforesaid in respect thereof have abandoned the said lands or have forfeited or surrendered the same to the commissioners rather than discharge the said liability attaching thereto, and the commissioners have entered into possession thereof, and it is expedient that the commissioners be authorized to sell the same discharged of all such liability and to hold the same until so sold."

Under the powers conferred by clauses 6 and 7 of this Act, Eton College was required to commute the liabilities attaching to their lands in consideration of the payment of an annual rent-charge issuing out of and charged upon the lands in respect of which the liability attached. The appellant contends that he is entitled to a deduction of the full amount of the apportioned rent-charge issuing out of his farm as a proper deduction under the Parochial Assessment Act, 1836, as being a deduction necessary to maintain the farm in a state to command the rent. The Divisional Court held that the rent-charge ought not to be deducted, mainly on the ground that the sum in question was not paid solely for the benefit of this particular farm. In my opinion this decision was correct, although I rather prefer to arrive at the same conclusion by a different route. It was assumed in argument by both sides that originally all the land in the level, subject to the peril of inundation, must have been liable to contribute to maintain the sea wall and works. The appellant's farm would have to bear its rateable share, and no more, but, under circumstances which cannot now be explained, part of the burden which originally rested on the lands of other people has been shifted on to the appellant's land. This may have been due to some pecuniary bargain, but the result is that the appellant's farm now bears more than its share. It seems to me that to the extent of this addition to its proper share the

rent-charge does not in principle differ from a mortgage created by a landowner, in respect of which it is clear that no deduction can be allowed.

In the course of the argument we expressed the view that it is not open to us on this appeal to consider any question except the right to deduct the entire apportioned rent-charge. Our decision will leave open the question whether any other sum ought to be allowed by way of deduction. On this ground I think the appeal fails.

There is another point to which I desire to refer. The rent-charge created under the powers of the Act of 1884 is a perpetual rent-charge, and will be payable to the commissioners without any reference to the actual cost of protecting this farm or the level as a whole from the peril of inundation. It is a charge differing in kind from the old liability, and, although it is not necessary for the purposes of this appeal to express a positive opinion, I feel a difficulty in saying that it is an expense necessary to maintain the farm in a state to command its rent.

VAUGHAN WILLIAMS L.J. In this case, in which in my opinion we have insufficient materials in the special case itself, I regret to say that I have arrived at a different conclusion from that of my learned brothers.

I agree with the Lord Chief Justice that it cannot be disputed, but that if this were an ordinary case of a tax paid to keep up a bank around this particular hereditament, or this and a number of other hereditaments, if there was a proper apportionment, the rent-charge would be a proper deduction, and that the fact that the rates made by the commissioners are charged on the owners makes no difference assuming it to be an expense necessary to maintain the premises in a condition to command the rent. The rate made by the commissioners would, in such case, clearly be a deduction within the Parochial Assessment Act, 1836, s. 1, as an expense necessary to maintain the premises in a state to command the rent which the hypothetical tenant might reasonably be expected to pay.

The Lord Chief Justice in his judgment goes on to say that the fact that the rent-charges are paid in respect of expenses

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incurred for a number of other properties within the same area which are benefited by the banks, and that the rent-charges do not bear a rateable proportion by acre over all the lands which are benefited, but that some of the benefited lands do not pay at all, and that the rent-charges had become specific chief rents commuting certain liabilities which existed at the time the Act of 1884 was passed, prevents the specific rent-charge paid to meet an expense which benefits or protects other property being allowed as a specific deduction from the gross estimated value of Moorbarn Farm.

I cannot convince myself that this conclusion of Lord Alverstone is right. It does not seem to me that the fact that this sea wall, without which the whole of Moorbarn Farm would be liable to inundation, also benefits or protects other lands in respect of which no contribution is made for the expense of maintaining the sea wall, prevents the whole of the rate charged on Moorbarn Farm being an expense necessary to maintain the hereditament in a state to command the hypothetical rent, even though the rent-charge was in fact paid and borne wholly by Eton College as owners of the property, and was in no part borne by the respondent, and the rent-charges were not, nor was any part thereof, expended specifically upon or in respect of the respondent's farm, but were expended in maintaining the sea walls, reens, and drainage works throughout the level generally, and in the repayment of loans created under the authority of s. 27 of the Caldicot and Wentlooge Level Act, 1884. The fact remains that the drainage works could not have been maintained without the rent-charge imposed by the Act, and that without these works the farm would have been diminished in value.

The recitals in the Act of 1884 throw much light on the nature of the rent-charge levied under it by the commissioners. The second recital is this. [The Lord Justice having read this recital, continued :—] There is no intention to alter the character of the liability or its incidence or the object. The Act simply commutes, in consideration of the payment of an annual rent-charge, the liability of the owners liable to repair the sea walls and other defences and works repairable by owners of lands

within the levels of Caldicot and Wentlooge by reason of frontage to the sea, ownership, prescription, custom, tenure, covenant, or otherwise, and gives the commissioners the right to collect the commuted charges and throws on them the duty of repair which, from want of unity of action by the owners liable to repair, had come to be ill-performed.

I do not think that the fact that the rent-charge under the Act is payable irrespective of whether the farm needed protection or not in any way alters the nature of the liability from what it was before the Act. The Act is passed merely to secure that the repair, which had come to be inefficiently done by reason of neglect and want of unity of action of the owners liable to repair the sea wall and defences, should be efficiently carried out. The co-operation secured by the execution of the necessary works and repairs by commissioners who are empowered by statute to require owners liable to construct, repair, maintain and do works within their jurisdiction, to commute their liability by the payment of an annual rent-charge issuing out of and charged upon the lands in respect of which the liability attaches, in my opinion was not intended in any way to alter the character of the original liability, even though the power to borrow money on the security of the rent-charges might involve the payment of the rent-charge by an owner whose land, in consequence of the recession of the sea, or some other cause, had ceased to require protection.

Lord Alverstone, however, does not seem to me to base his judgment upon any change in the nature of the liability. He bases it, as I understand, upon the fact that these rent-charges are paid in respect of expenses incurred for a number of other properties within the same area, which are benefited by these banks, and that there are lands which are benefited and do not pay at all. The view of the Lord Chief Justice is that these facts on the decided cases, and in particular the case of *Reg.* v. *Vange* (1), negative the claim of the owner of this land to deduct this rent-charge as a whole in the assessment of the rateable value of the land in a case where the commuted rate is paid to maintain works which protect from inundation not only

(1) 3 Q. B. 242.

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the land which bears the tax, but also land which makes no contribution towards the expense of maintenance.

I will examine those cases. *Reg.* v. *Vange* (1) is, as the Lord Chief Justice says, not a very satisfactory case. It was a special case, and the question for the opinion of the Court was whether the sum assessed upon and paid by the appellant ought to be deducted from the assumed gross rental in estimating the annual or rateable value of the farm in assessing the appellant to the poor rate. It was a question whether the whole sum could be deducted, not a part. The quarter sessions, subject to a case for the opinion of the Court, made the deduction which, as the amount assessed by the commissioners for sewers rate was equal to the rack rent or full value of the farm and land, left the hereditament of no rateable value. In support of the order of sessions it was argued—(1.) that the deduction was right; (2.) that there was no beneficial occupation. On the other side, Mr. Erle argued that, as the owner or occupier, Mr. Hilton, owned the farm as assignee of one Cropenburgh, who paid nothing for the purchase of the farm, but had it conveyed to him in consideration of maintaining the wall for ever and keeping all the ground in Canvey Island free from inundation, the case did not differ from a case in which the owner purchased land with its benefits subject to an incumbrance. Lord Denman, in delivering the judgment of the Court that the 123*l.*, the sum collected by the commissioners, ought not to be deducted from the gross in assessing the rateable value, based his argument chiefly on the question whether the circumstances negatived beneficial occupation, holding that they did not, and did not expressly deal with the question of the effect on the right of deduction of the fact that the sum collected by the commissioners went to maintain a sea wall which benefited other lands which did not contribute by protecting them from inundation.

It is true that the point was not discussed, or at all events not decided in that case, that quite independently of the fact that the estate had been conveyed in consideration that the purchaser should indemnify the vendors against all liability in respect of sea walls and for no other price or consideration, the occupier

(1) 3 Q. B. 242.

could not deduct the whole cost of maintenance of the sea wall because there were many lands within the level which were benefited by the sea wall but bore no part of the expense. It is on this point that I understand the decision of the King's Bench Division to be based. I think that the true meaning of the judgment is well set out by Cave and Wills JJ. in *Reg.* v. *Smith.* (1)

The difference between *Reg.* v. *Vange* (2) and the present case is that in *Reg.* v. *Vange* (2) the owner had obtained the conveyance of the property in consideration of his undertaking at his own proper cost to maintain the wall necessary to prevent inundations from the river, and had paid nothing else for the purchase. He had, in effect, taken the land with its benefits subject to an incumbrance. Whereas in the present case it appears from paragraph 12 of the special case that before the passing of the Caldicot and Wentlooge Level Act, 1884, some of the lands within the level had become exempt from rent-charges and liability, and this fact was due to those lands having, prior to the passing of that Act, been disposed of by the then owners, freed and discharged from and indemnified against all liability to pay or contribute towards the cost of making or repairing sea walls or other defences and works for the protection and drainage of the level. The lands within the level which were not subject to any such rent-charge or liability, and in respect of which no contribution was made towards the expenditure incurred by the commissioners in repairing and maintaining the sea walls and reens and drainage of the level, were benefited by the said expenditure equally with, and to the same extent as, other lands within the level which were subject to rent-charges. The sea walls maintained by the commissioners out of the said rent-charges extended from eighteen to twenty miles in length.

There is nothing in the special case to shew how the liability of the owners of Moorbarn Farm to repair sea walls arose, whether by reason of frontage to the sea, ownership, prescription, custom, tenure, or covenant, or otherwise. It may have been by reason of frontage ownership of the wall or any of the grounds mentioned: and there is nothing to shew that the respondents

(1) 55 L. J. (M.C.) 49. (2) 3 Q. B. 242.

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ever owned or disposed of the lands which were disposed of freed and discharged from all liability to pay or contribute towards the cost of making or repairing sea walls and other defences for the protection and drainage of the level. The owners who in fact disposed of land freed and discharged from liability to pay or contribute towards the cost of making or repairing the sea walls may have got an enhanced price, but, even if they did, this would not have bound the commissioners prior to 1884. They could have enforced the liability to contribute of the benefited lands, notwithstanding the private arrangement. It is a case in which all one can say is that it is agreed by the parties that the exemption of the particular lands from liability was due to the owners, whoever they were, having disposed of them freed and discharged from and indemnified against all liability to pay or contribute towards the cost of making and repairing sea walls, etc.

It does not seem to me that Eton College, as owners of Moorbarn Farm, have been found by the case to be the persons who disposed of the land freed and discharged from and indemnified against all liability to pay or contribute, and the case, therefore, is simply one in which some owners of lands previously liable to contribute disposed of them freed from contribution. The mere fact that some lands which take a benefit, and are therefore liable to assessment by the commissioners of sewers, became exempt prior to the passing of the special Act of 1884, is not in my judgment sufficient to justify the conclusion either that the liability in respect of Moorbarn Farm is a liability voluntarily assumed by the owners, or the conclusion that, in every case in which some lands in the level are exempt, a deduction must be made from the sum of the commuted liability before the amount thereof can be deducted from the gross value of the land for the purpose of poor rate assessment. In truth, it not infrequently happens, as appears from Comyns' Digest, that lands benefited escape assessment by the commissioner under a commission issued by the Crown. In the present case the commuted liability in the shape of an annual rent-charge is the contribution of these lands towards works which could not have been maintained but for the contributions charged on the lands, and

without these works Moorbarn Farm would have been inundated and diminished in value.

In my judgment there would have been no difficulty in this case but for the statements in paragraph 12 of the special case as to how some of the lands within the level came to be exempt, and, as I have already stated, I do not think the vague statements in that paragraph are sufficient to debar the occupiers of Moorbarn Farm from deducting the amount of the rent-charge from the gross estimated value.

I think that this case ought to be sent back to quarter sessions to get some clearer statement of how some lands came to be exempted, but if this is not desired by the parties, then a question of onus and shifting of proof seems to me to arise. As soon as the gross estimated value has been arrived at, it seems to me that the onus is on the occupier to prove the deduction he claims. The occupier must be taken to have proved the facts stated in the special case, including the fact that the land in question is subject to a rent-charge for the maintenance of a sea wall, without which wall his land would be inundated with water and diminished in value. Thereupon I think that the onus would shift to the rating authority, who would have to prove the facts negativing the prima facie right of deduction by reason of the expenditure by the occupier for the maintenance of the wall. If the rating authority do not establish such facts, and the case is not sent back to sessions to find fuller and clearer facts, I think that, as the rating authority have not satisfied the onus thrown on them, this appeal ought to be allowed.

It is quite consistent with paragraph 12 that these lands which now are freed and discharged from contribution by reason of having been disposed of by the then owners were disposed of by the owners of lands other than Moorbarn Farm, and would have continued liable to contribute to the cost of maintenance but for the bargain made when the lands were disposed of, which bargain, however, did not in law bind the commissioners for the time being or their successors. It may be that the lands disposed of free and discharged of contribution were part of the same estate as that of which Moorbarn Farm was a part, but paragraph 12 does not say so.

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BUCKLEY L.J. The question in this case is as to the rateable value of certain farms and lands situate in the level of the hundreds of Caldicot and Wentlooge, in the county of Monmouth. These and other lands in the level are protected from inundation of the sea by sea walls and defences. The lands in question in Green's case, which are called Hill Farm, have been assessed at 189*l.* gross, and 160*l.* 10*s.* rateable value, and the question is as to deduction from the last-mentioned sum in respect of the rent-charges presently mentioned. The lands in question in Stead's case are other similar lands; I need not go into detail with regard to them. For the purposes of this judgment I will deal with Green's case.

Hill Farm, together with other property situate within the level, also belonging to Eton College, is subject to annual rent-charges amounting to 280*l.* 8*s.* 7*d.* payable annually in respect of the provision and maintenance by the commissioners under the Caldicot and Wentlooge Level Act, 1884, of the sea walls in the level and of the reens and drainage of the lands in the level. The appellant's contention is that this 280*l.* 8*s.* 7*d.*, or an apportioned part of that sum, attributing the amount rateably to these lands and the other lands charged therewith (which I will call the apportioned rent-charge), ought to be deducted from the 160*l.* 10*s.* in arriving at the rateable value. He desired also to argue a further point as follows: The sea walls and defences in question protect not only the lands which are subject to the rent-charge, but also other lands which are not subject thereto, and which contribute nothing to the maintenance of the sea walls and defences. The appellant desired further to argue that if he was not entitled to a deduction of the apportioned rent-charge, he was at least entitled to the deduction of so much of the apportioned rent-charge as would be arrived at by attributing the apportioned rent-charge rateably by acreage to these lands and to the other lands protected by the sea walls. This latter contention, I think, is not open to him upon the case as stated. The only question, therefore, for decision is whether he is entitled to a deduction of the apportioned rent-charge arrived at by attributing the 280*l.* 8*s.* 7*d.* rateably to these lands and the other lands charged.

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The rent-charge was created under the Act of 1884. Its amount is such sum as represents the annual liability of the owner in respect of the lands at the time when the Act was passed : see s. 7, sub-s. 2. Mr. Ryde pressed us with an argument that this statutory rent-charge is not a reproduction in a new form of a previously existing liability, but is a new charge arising under the statute payable perpetually, whether the protection of the sea wall is hereafter required or not. He relied upon *Blyth Harbour Commissioners* v. *Newsham* (1) in support of that contention. In my opinion the statutory charge is not a new charge, but is upon the language of the Act of 1884—see ss. 6 and 7—a commutation of a then existing liability by charging upon the lands an annual sum representing such annual liability. *Blyth Harbour Commissioners* v. *Newsham* (1), when examined, comes only to this, that in the hands of Sir Matthew White Ridley the soil of the harbour and the tolls being vested in one owner, the existence of the latter enhanced the value of the former, but that when under the statute the tolls were severed from the soil and became tolls in gross, they no longer enhanced the value of any land so as to add to or increase its rateable value: that the existence of the quays—which were, of course, rateable—did but stimulate or tend to increase tolls payable, not in respect of the quays, but in respect of the harbour; and that, although both the tolls and the quays were vested in the harbour commissioners, yet the soil of the harbour was not, and the tolls were therefore vested in them as a separate property in gross, and were therefore not rateable themselves, and that, inasmuch as they were not paid in respect of the quays, they did not increase the rateable value of the quays. The facts in the present case are not similar. I reject the argument that the rent-charges are to be disregarded because they are new charges created by the statute, and that they are therefore not the subject of deduction.

The next material fact is found from paragraphs 11 and 12 of the case. It results from those paragraphs that the charge upon those lands which are charged does not represent the apportioned expense of maintaining the sea walls attributable to the lands

(1) [1894] 2 Q. B. 293 and 675.

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protected thereby. The lands which at the date of the statute of 1884 were charged had, by some contractual dealings between those who were at a previous time the owners of the lands charged and the other lands protected, become burdened with not only their own rateable proportion of the expense, but also with the rateable proportion attributable to other lands—these latter lands having been disposed of upon the terms that they should be discharged from and indemnified by the former lands against all liability to contribute to the expenses. By way of illustration, suppose that the lands now charged with the 280*l.* 8*s.* 7*d.* would, upon a rateable distribution of the expense over the lands protected, have come under a liability to, say, 50*l.* a year, leaving a balance of 230*l.* attributable upon a rateable distribution of the expense to the other lands protected, the fact is that the former have contractually been brought under an additional annual liability of 230*l.* to the indemnity of the latter. This differs, in my opinion, in no respect from a mortgage or incumbrance upon the lands here in question, and, inasmuch as the only question before us for decision is whether the whole of the apportioned rent-charge is to be deducted, it follows that if any part of it is in the nature of a mortgage or incumbrance, that question must be answered in the negative.

In determining rateable value, the question is not what is the net annual amount which the owner or occupier can put into his pocket after discharging all necessary outgoings, but what is the rent at which the same might reasonably be expected to let, deducting therefrom the particular items mentioned in s. 1 of the Parochial Assessment Act, 1836. It is immaterial whether the owner enjoys the rent or is subject to pay it away as interest to mortgagees or to devote it to public purposes: *Mersey Docks* v. *Cameron*. (1) The annual sum which the incumbent necessarily pays in respect of the salary of a curate: *Reg.* v. *Sherford* (2); the necessary expenses of the repair of the chancel: *St. Asaph* v. *Llanrhaiadr-yn-Mochnant* (3); the annual charge imposed on licensed premises by s. 3 of the Licensing Act, 1904: *Waddle* v. *Sunderland Union* (4), although necessarily payable by

(1) 11 H. L. C. 443, 463.
(2) L. R. 2 Q. B. 503.
(3) [1897] 1 Q. B. 511.
(4) [1906] 2 K. B. 899.

the owner, are not the subject of deduction for purposes of rating.

The decision in *Reg.* v. *Vange* (1) has been much debated before us. Lord Denman, in delivering the judgment of the Court in that case, does not discuss in any way the question whether, upon the footing of benefit to the appellant's lands by way of protection from inundation, the whole or some part of the 123*l.* would be properly the subject of deduction in arriving at the rateable value. He discussed only beneficial occupation. The dominant sentence of the judgment is (2): "Again, suppose that instead of having paid nothing for it, and taking it as he has with the incumbrance, he had purchased it, and left the whole purchase-money unpaid, but secured by mortgage upon the property, in what respect would that charge have differed from the present? Yet in the case lately supposed he surely would have been rateable." The case seems to me to be no more than an affirmance of the proposition that the existence of an incumbrance which involves an annual charge—say for interest—is a matter not relevant in the determination of rateable value. Wills J. in *Reg.* v. *Smith* (3) I think so understood the case. That decision, however, although not relevant, in my judgment, upon the question of right to deduction to the extent to which the annual sum represents the protection of the property, is directly an authority for that which I think is the ground for the decision of the present case, namely, that these rent-charges, so far as they represent an incumbrance upon this land for the benefit of other lands, cannot be deducted for the purpose of arriving at rateable value.

Nothing, to my mind, turns upon the distinction urged upon us between a charge which does, and one which does not, fall upon the tenant or occupier. In *Reg.* v. *Gainsborough* (4) Blackburn J. says, and I agree, that it is immaterial whether the charge be primarily upon the occupier or the landlord. If it be once ascertained that the sum is one which falls within the words of deduction in the Parochial Assessment Act, 1836, it is immaterial upon whom the amount primarily falls.

(1) 3 Q. B. 242.
(2) Ibid. at p. 255.
(3) 55 L. J. (M. C.) 49.
(4) L. R. 7 Q. B. 64-8.

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In my judgment this appeal fails, and upon this ground: that what I have called the apportioned rent-charge (namely, such proportion of the 280*l.* as is attributable to these lands if the 280*l.* be attributed rateably over all the lands charged therewith), cannot be the subject of deduction, because, as to some part at least of that apportioned rent-charge, the amount is a mere mortgage or incumbrance on the land. This decision does not involve that if this apportioned rent-charge were itself apportioned over all the lands benefited, the lands here in question would not be entitled to a deduction of such sum as should thus be found to be payable for their protection.

I think the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Hallowes, Carter & Ellis; Frederick Kinch, for Lyndon, Moore & Cooper, Newport, Monmouth.*

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April 29; *May* 17.

ATTORNEY-GENERAL (ON THE RELATION OF THE SPALDING UNION RURAL DISTRICT COUNCIL) AND THE SPALDING RURAL DISTRICT COUNCIL *v.* GARNER AND ANOTHER.

Local Government—Inclosure Act—Award—Herbage on Road—Property vested in Parishioners—Damage—Right of Action—District Council or Parish Council—Injury to limited Section of Public—Attorney-General—Right to join as Plaintiff.

By an award made in 1801 under an Inclosure Act the grass and herbage growing in a private road in a parish was to be let yearly by the surveyor of highways or by such other person as the parishioners in vestry assembled should appoint, and the money arising therefrom was to be expended in the repair of the public and private roads in the parish. The defendants caused damage to the letting value of the grass and herbage by wrongfully permitting cattle to graze in the road, and an action was brought against them by the Attorney-General, on the relation of the rural district council, and by the district council for an injunction and damages:—

Held, that the action failed, as regards the district council, because the right of property in the grass and herbage was vested in the parish

council and not in the district council; and as regards the Attorney-General, because the right of property which had been injured was one enjoyed by only a limited section of the public, namely, the parishioners, and not by the public at large.

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FURTHER consideration by Channell J. of an action tried with a jury at the Lincoln Assizes.

The plaintiff, the Attorney-General, claimed an injunction to restrain the defendants from wrongfully stocking and depasturing a certain road or drove in the parish of Gosberton, in the county of Lincoln, known as Gubboles Drove, and thereby injuring the value for letting purposes of the grass and herbage growing in the road. The relators, the Spalding Union Rural District Council, also claimed as plaintiffs a like injunction and damages.

An Inclosure Act passed in 1799 gave power to commissioners to set out certain roads, and by an award made in 1801 by the commissioners it was provided that certain roads in the parish of Gosberton, including Gubboles Drove, which was a private occupation road, should for ever be repaired and maintained by the inhabitants of the parish in the same manner as public highways were, or should by law be, directed to be repaired and maintained; and the award further provided that the grass and herbage which should thereafter grow, arise or renew within and upon the said roads (including Gubboles Drove) should be let yearly and every year in Easter week by public auction by the surveyor or surveyors of the highways in the parish of Gosberton, or by such other person or persons, and under such restrictions and regulations as the occupiers of lands and tenements in the parish, or a majority of them in number and value to be assembled at a public vestry or meeting to be held for that purpose, should order, and the money arising therefrom should from time to time be paid, laid out, and expended in, for, and towards the repairs of the public and private roads within the parish.

Gubboles Drove was a broad road entirely of grass and about two miles in length. One of the defendants, the other being his servant, occupied a small piece of land adjoining this road, over which he had a right of way. He stocked this land with a large

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number of beasts, greatly in excess of what it could really support, and continuously drove them twice a day along the road for the purpose, as he alleged, of giving them water, which could be obtained along the drove, but his real object was, as the jury found, to get the benefit of the pasturage in the road.

By the Local Government Act, 1894, the powers and duties of the highway authority for the parish of Gosberton were transferred to the relator plaintiffs, and they alleged that they thereby became entitled to receive on behalf of the inhabitants of the parish the money arising from the annual letting of the grass and herbage in the road, and that by reason of the defendants' acts they were prevented from obtaining the full value thereof. The jury awarded 5*l.* as damages for the injury to the letting value of the grass and herbage.

Hugo Young, K.C., and *G. W. Powers*, for the defendants. The plaintiffs, the district council, have no cause of action. They claim as the successors of the surveyor of highways, but the surveyor of highways had no right of property in the herbage or in the proceeds of the letting. The persons entitled were the inhabitants in vestry assembled, and their rights have now, by s. 6 of the Local Government Act, 1894, passed to the parish council: *Haigh* v. *West*. (1) Secondly, the action cannot be maintained by the Attorney-General, for the wrong complained of is not a public wrong. The road is a private road; but even if it were a public road there has been no interference with the rights of the public. If any right has been interfered with, it is the private right of property in the proceeds of the annual letting of the herbage which was formerly vested in the parishioners and is now vested in the parish council, and for the protection of that right the intervention of the Attorney-General is not required. [They also contended that the only person damaged by the acts of the defendants was the person to whom the grass and herbage had been let, and that there was no evidence of any injury for the reversion; that in any event the damage was so trivial that the case was not one in which an injunction should be granted.]

(1) [1893] 2 Q. B. 19.

Stanger, K.C., and *Hollis Walker*, for the plaintiffs. The district council, as the successors of the surveyor of highways, are, on the true construction of the award, the persons entitled to the money realized by the letting of the herbage, and have been, rightly, made plaintiffs. Assuming that they are the wrong plaintiffs, the action nevertheless succeeds at the suit of the Attorney-General. *Stoke Parish Council* v. *Price* (1) shews that neither the district council nor the parish council could have brought this action without joining the Attorney-General as plaintiff; and if he is made a plaintiff, it is immaterial that the wrong persons are the relators: *Attorney-General* v. *Logan*. (2)

Hugo Young, K.C., in reply, referred to *Sheringham Urban District Council* v. *Holsey* (3) and *Wednesbury Corporation* v. *Lodge Holes Colliery Co.* (4)

Cur. adv. vult.

May 17. CHANNELL J., after stating the facts substantially as set out above, said that the case was one in which an injunction ought to be granted if the proper parties had been made plaintiffs, and, after referring to the provisions of the Inclosure Act and the award, the learned judge continued as follows:—The award provided that the grass and herbage growing in this road was to be let annually by auction. The inhabitants of the parish in vestry assembled were to make regulations for the purpose, and were to appoint the auctioneers, but if they did not do so the surveyor of the highways was to sell the herbage. Thus, although the surveyor of highways is mentioned first in the award as the person who is to let the herbage, his right to do so only arose if the parishioners failed to appoint anybody to let it, and the only reason why the surveyor of highways was to act in the matter was because the sum realized by the letting was to be expended in the repair of the roads. The surveyor was a mere officer to do certain duties, and he derived no benefit himself. The beneficial right was clearly in the parishioners. The parishioners, therefore, in my opinion had a right of property in this grass

(1) [1899] 2 Ch. 277.
(2) [1891] 2 Q. B. 100.
(3) (1904) 20 Times L. R. 402.
(4) [1907] 1 K. B. 78.

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and herbage. The case of *Haigh* v. *West* (1) was cited in argument as shewing that the title to the soil of the road would be in the churchwardens and overseers by the Statute of Limitations, if in no other way. That was a different case from the present, because although there was there a practice of letting the herbage, similar to this, the origin of it was not known; whereas in this case the origin is known, for it is set out in the inclosure award. Consequently, as the user of this road has been entirely in accordance with the award, I do not think that any right has been gained by this user to dispossess any person of the title to the soil, in whomsoever that was left by the award. What the parishioners had may be a property in the soil of the road, or possibly in something less, but it is a right of property, because the right to the herbage of land is a well-recognized right in law, called in the older books vestura terræ. Probably, before the Local Government Acts, the legal title to that property was in the churchwardens and overseers, but the beneficial right of property was, in my opinion, vested in the parishioners. Now, under the Local Government Act of 1894, the rights, duties, and liabilities of the surveyor of highways were transferred to the district council, and it was apparently thought that on the true construction of this award the surveyor of highways had some right to this herbage, and therefore the district council, as the successors of the surveyor of highways, were made relators in this action, and were joined also as plaintiffs on their own account, on the ground that they were the persons who had been damaged by the letting value of the herbage being diminished. I do not think that that is the correct view. I think that it was the parishioners, and that now, under the Local Government Act, it is the parish council, who have succeeded to all the rights of the parishioners as such (the beneficial right is of course still in the parishioners, as formerly) and to any title that the churchwardens and overseers, or any other person, may have possessed as trustees for the parish. I come to the conclusion, therefore, that the parish council are now the owners of this right of property, as trustees for the parishioners, and it is the parish council,

(1) [1893] 2 Q. B. 19

and not the district council, who have suffered loss by reason of the letting value of the herbage being diminished by the action of the defendants.

The action is, however, brought, not only by the district council as plaintiffs, but also by the Attorney-General on the relation of the district council. The question therefore arises whether in these circumstances the Attorney-General can maintain the action, and obtain an injunction in respect of the wrongful acts of the defendants. The case of *Attorney-General* v. *Logan* (1) and the cases there cited shew that, when the Attorney-General has a right to bring an action (it was formerly called an information), it is immaterial that the relator is the wrong person and is a person or body who has no interest in the matter. The relator is joined only for the purpose of costs, as the Crown neither pays nor receives costs—at least that was the rule formerly, though it has now been somewhat departed from; but the relator is liable to pay costs, and he has the conduct of the action, and gets his costs if costs are awarded to the plaintiff. But if the Attorney-General has a good cause of action, or would have a good cause of action, either on an information filed by himself without any relator, as he has power to do, or filed on the relation of some different person from the person who actually is relator, then the case of *Attorney-General* v. *Logan* (1) shews that the Attorney-General has a right to maintain the action. The question, therefore, which I have to consider is not whether this action in its present form is rightly framed, but whether the Attorney-General could in any case have taken proceedings to obtain an injunction against these defendants. The Attorney-General takes proceedings as the representative of the public, for he represents the Crown and the Crown represents the public. I quote from a book which I understand is recognized as an authority in the Chancery Division, namely, Calvert on Parties (2nd ed. at p. 26), and the matter is there stated as follows: "The Attorney-General is by law the representative of the public interests. The reason is that he is the officer of the Crown, and that, according to the principles of our law, the interest of the public is vested in the Crown. 'The Attorney-General,'

(1) [1891] 2 Q. B. 100.

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said Lord Eldon in *Attorney-General* v. *Brown* (1), 'is an officer of the Crown, and in that sense only, the officer of the public.' Whenever, therefore, the rights of the Sovereign, as the guardian of the interests of the public, are affected, they must find their protection in the presence of the Attorney-General. The analogy between this case and that of a corporation is still further maintained, inasmuch as the presence of the Attorney-General does not prevent the necessity of bringing any individuals before the Court, who have interests peculiar to themselves, and independent of those, which they hold in common with all the rest of the community. In respect of the latter " (that is, interests in common with all the rest of the community) " such persons are represented by the Attorney-General; but in respect of the former, they must appear on their own behalves." It is to be observed that the author speaks of interests in common with all the rest of the community. The difficulty in the present case is to ascertain whether the Attorney-General can interfere in a case where the interests involved are those, not of the whole community, but of a limited portion of it, such as the inhabitants of a parish.

In *Stoke Parish Council* v. *Price* (2), which was a case relating to the use of a spring of water, North J. held that the Attorney-General was a necessary party, and as he had not been joined, the action was dismissed. The right there was claimed by the parish council, but it clearly was not a right of property, and it was not a right peculiar to the inhabitants of the parish, but a general right claimed on behalf of all Her Majesty's subjects to take water from the particular source in question. That decision, therefore, is not of very much assistance in the present case.

The next case is *Sheringham Urban District Council* v. *Holsey* (3), in which Joyce J. held that the matter in question was a right of property of the parish. It was an action for wrongfully removing a post which the district council had put up on a footway to prevent its being used as a carriage-way. Joyce J. held that the district council had a property in the post;

(1) (1818) 1 Swans. 265, at p. 294. (2) [1899] 2 Ch. 277.
(3) 20 Times L. R. 402.

that they were persons who had an interest peculiar to themselves, as it is stated in the passage from Calvert on Parties which I have read; and that in these circumstances it was not necessary that the Attorney-General should be joined as a party. The same proposition as to individual rights is to be found in *Attorney-General* v. *Logan* (1), and I think that it is one as to which there can be no doubt. In my opinion it follows from these authorities that in the circumstances of this case the parish council might have maintained the action, and that if the parish council had been plaintiffs it would not have been necessary to join the Attorney-General. As to that I have no doubt at all, but it does not decide the whole matter, for there remains the question whether the Attorney-General may not be joined as a party to an action in a case in which it is not absolutely necessary that he should be joined. I find an almost complete absence of authority on that point, but, forming the best judgment that I can, it seems to me that the rights, which the Attorney-General intervenes in order to protect, as representing the Crown, in the capacity, as it is stated in some of the cases, of parens patriæ, must be rights of the community in general, and not rights of a limited portion of His Majesty's subjects, especially when the limited portion in question, the inhabitants of a parish, have representatives who can bring the action. Therefore, although with very considerable doubt, I have come to the conclusion that the Attorney-General has no right to ask for an injunction in this action.

The action succeeded on the merits, because the defendants were in the wrong as to their user of the road, but it was brought by the wrong parties. No application was made at the trial to amend by making the parish council plaintiffs, and I am not disposed to make the amendment now, when the result of the action is known.

With regard to the costs, a great part of the costs, practically the whole costs of the hearing at the assizes, has been incurred on the question as to whether the defendants had done the acts complained of, which they denied, and on those issues the plaintiffs have succeeded. The action having been

(1) [1891] 2 Q. B. 100.

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tried with a jury, the costs would naturally follow the event, and, although the defendants would get the general costs of the action, the plaintiffs would get the costs of the issues on which they have succeeded. The taxation of the costs on this basis would, however, be a very troublesome and difficult process, and in the result it would in all probability be found that the two sets of costs practically balanced each other, and that approximately equal sums were due from each party to the other. That being so, I think that I have good cause for making an order that the defendants have judgment without costs, except the costs of the argument on further consideration, and I accordingly make that order.

Hugo Young, K.C., submitted that, as the plaintiffs were the wrong parties, they were not entitled to the costs of any of the issues.

CHANNELL J. The defendants chose to put in issue all the facts alleged by the plaintiffs, and I am clearly of opinion that, if the costs followed the event, the plaintiffs would be entitled to recover from the defendants the costs of the issues on which the defendants have failed.

Judgment for defendants with costs of the argument on further consideration only.

Solicitors for plaintiffs: *Routh, Stacey & Castle, for Maples & Son, Spalding.*

Solicitors for defendants: *Smith, Rundell & Dods, for W. H. Clements, Spalding.*

F. O. R.

HOLDEN AND ANOTHER *v.* THOMPSON AND OTHERS.

1907
May 10.

Maintenance of Suit—Charity induced by Religious Sympathy—Common Interest.

Although there is an inducement based on a common religious belief which leads a rich person out of charity to assist a poor one in defending a suit, the assistance given is none the less charitable, and the case falls within the specific exception from the law against maintenance established by the authorities founded on the interest arising out of charity.

APPEAL by the defendants from the decision of the deputy judge of the county court at Birkenhead.

The plaintiffs, a firm of solicitors, sued the defendants, who were nine members of the committee at Birkenhead of a society known as the Kensit Crusade Society, to recover 100*l.* alleged to be due to them on a bill of costs in the following circumstances. In 1905 two persons named Davis and Wright had some child relatives at a home in Birkenhead known as "All Saints' Home." As they did not approve of the religious instruction which was given to the children at the home, they removed them. The authorities of the home took proceedings in Chancery to recover the custody of the children, and Davis and Wright instructed the plaintiffs' firm to act for them in resisting these proceedings. They accordingly acted for them for a month. At the end of that time communications took place between the plaintiffs and Mr. Thompson, one of the defendants, who was the chairman of the Kensit Crusade Committee at Birkenhead. Mr. Thompson brought the matter before the committee of the Kensit Crusade. The committee, being in sympathy with the religious views of the relatives of the children, who were not persons of means, resolved that the plaintiffs should continue to act on their behalf, and so instructed them. The plaintiffs, with knowledge of the facts above set out, continued to represent them, and on April 26, 1905, the matter came before the committee again. The costs of the proceedings had been originally estimated at 40*l.*, but it was found that they would amount to about 150*l.* According to the plaintiffs' case the defendants

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were informed of this, and, notwithstanding, instructed the plaintiffs to go on with the work. The bill in all amounted to 148*l.*, and the action was brought against the defendants individually for the recovery of the sum of 100*l.*, the balance being abandoned by the plaintiffs. Among other defences in the county court the point was taken on behalf of the defendants that the plaintiffs were not entitled to recover, on the ground that the contract, if any, entered into by the defendants with them was illegal, being within the rule against maintenance. The deputy county court judge gave judgment for the plaintiffs.

Certain of the defendants other than Thompson appealed.

Firminger, for the appellants other than Thompson. The respondents are not entitled to recover the charges, for they were made in respect of an action in which the appellants were guilty of maintenance. There was no common interest in the subject-matter of the litigation. In order to justify the appellants maintaining the suit of Davis and Wright, a common interest recognized by the law in the matter at issue is necessary, or the case must fall within one of the specific exceptions against maintenance established by the authorities: *Alabaster* v. *Harness*. (1) Neither of these conditions are satisfied in the present case. The exceptions to the rule against maintenance are enumerated in the judgment of Coleridge C.J. in *Bradlaugh* v. *Newdegate* (2) as being an actual valuable interest in the result of the suit, or where there is consanguinity or affinity, or the relationship of master and servant or the interest which charity and compassion on behalf of a poor man inspire, where the latter would be oppressed but for the help of his rich helper. Those exceptions were adopted by Lord Esher M.R., in giving judgment in *Alabaster* v. *Harness* (1), and he expressed the opinion that the exceptions ought not to be extended.

Rigby Swift, for the respondents. Even if the appellants were guilty of maintenance, they cannot set up their own wrong by way of defence: *Findon* v. *Parker*. (3) The motive of the appellants was charitable, which is sufficient to

(1) [1895] 1 Q. B. 339. (2) (1883) 11 Q. B. D. 1.
(3) (1843) 11 M. & W. 675.

prevent maintenance. The fact that the charitable aid was induced by religious sympathy does not make the aid the less charitable: *Harris* v. *Brisco*. (1) In *Findon* v. *Parker* (2), where a similar defence to the present was set up, Lord Abinger pointed out that if any ground could be fairly suggested for making the contract legal, the Court ought to adopt it. There is a well-defined distinction between the position of a person who aids a plaintiff, and one who aids a defendant, where the question of maintenance is involved. Upon the facts of the present case there was nothing before the county court judge to compel him to hold that there was maintenance, and the onus of proof was on the appellants. [*In re Thomas*, *Jaquess* v. *Thomas* (3) and *Greig* v. *National Amalgamated Union of Shop Assistants* (4) were also referred to.]

Firminger, in reply. If the appellants were guilty of maintenance, the contract with the respondents is void. There is nothing which prevents the appellants taking the objection. *Findon* v. *Parker* (2) is distinguishable. In that case the solicitors were not possessed of the information which would shew them that the agreement might be bad for maintenance, but in the present case the respondents knew all the circumstances. The appellants' motive consisted of the fact that their religious convictions were in accordance with those of Davis and Wright. It was merely religious and not charitable, and is not included in the exceptions recognized in *Bradlaugh* v. *Newdegate*. (5)

PHILLIMORE J. The question we have to consider is whether the contention is sound on behalf of the appellants that this action fails on the ground of maintenance. There may be other matters which might have had to be considered before we should have allowed this action to be defeated on that ground, but I think it is unnecessary to consider them, because I think it may very properly be contended that this case comes within the kind of exception mentioned in the judgment of Buller J. in *Master* v. *Miller* (6), where he instances the kind of interest which would

(1) (1886) 17 Q. B. D. 504.
(2) 11 M. & W. 675.
(3) [1894] 1 Q. B. 747.
(4) (1906) 22 Times L. R. 274.
(5) 11 Q. B. D. 1.
(6) (1791) 4 T. R. 320.

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Phillimore J.

justify the maintaining by one person of another in a lawsuit. Lord Coleridge C.J., in delivering judgment in *Bradlaugh* v. *Newdegate* (1), gave the following examples of such an interest: "A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose." In the present case the point as to maintenance was sufficiently taken in the Court below to warrant it being raised upon appeal. It was not insisted upon in such a way as to bring out all the facts of this case, but there was no doubt that the respondents knew who were giving them the authority to act and why. They knew that Davis and Wright were relatives of two children, and that they had removed them from an institution to the religious principles of which they objected, and that some one on behalf of the institution was taking proceedings in the Chancery Division to recover the custody of the children so that they might remain at the institution. They also knew that unless Davis and Wright successfully defended those proceedings the result would be that the children would be restored to the institution. They also knew that Davis and Wright were poor, that their religious principles were those shared by the Kensit Crusade, and that if assistance was given by the crusade it would be because the members of that body sympathized with the religious views of Davis and Wright and were anxious to support them in preventing these children from going back to this institution. So far they were fixed with knowledge. What exactly the proceedings in Chancery were, what would have been their precise effect, whether there were other matters in addition to the religious question and how far Davis and Wright had any personal interest in the result of the Chancery proceedings, were points not brought out at the trial, and in these circumstances we are entitled and bound to consider that the proceedings in Chancery were such as to make it necessary for the committee of the Kensit Crusade to aid Davis and Wright in their defence if it was to be adequately brought before the Court. If in

(1) 11 Q. B. D. 1.

any shape those proceedings would be such as to bring the committee within the rule laid down in *Master* v. *Miller* (1) or *Bradlaugh* v. *Newdegate* (2), we are bound to assume that the proceedings took that form. That being so, we may properly say that this case is within the exception of giving money to a poor man out of charity to maintain a right which he would not otherwise secure. On behalf of the appellants it was contended that this aid was not given out of charity but religious sympathy only. The answer is that it was given out of charity and religious sympathy. In this world of poverty the richest and most benevolent man cannot support every poor and deserving person, and there are inducements based on nationality, kinship, locality, or common religious belief which lead a rich man to assist one poor man rather than another. It is none the less charity, and none the less does it escape being criminal. If it appears that the poor man is being persecuted for religious opinions common to himself and a rich man, there is no reason why the latter should not support the former. For these reasons I see no difficulty in bringing this case within the exception I have mentioned. I am aware that the rule against maintenance has been applied in the case of an election petition, and there are no doubt other cases not strictly connected with law-suits. But I am not at all sure that, when questions as to the custody of children come into a suit, the law of maintenance necessarily applies. For example, if a man or woman helped a poor woman to obtain the custody of her children from a drunken or ill-behaving father, I am not sure that it would be necessary to shew, in order to prevent the rule against maintenance applying, that the woman had no money. I should be sorry to say that the law of maintenance would apply to that case. For these reasons I am of opinion that the present case comes within the exception as to maintenance founded on charity, and that consequently the respondents are not disentitled to recover in the action by reason of the contract between the appellants and themselves being an illegal one.

BRAY J. I am of the same opinion, and for the same reasons.

(1) 4 T. R. 320. (2) 11 Q. B. D. 1.

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I think other reasons could be found for our decision, but it is sufficient to say that it can be supported on the grounds my brother has mentioned.

Appeal dismissed.

Solicitor for appellants: *J. B. Sorrell, Junior.*

Solicitors for respondents: *A. B. Sanders, for Thompson, Hughes & Mathison, Birkenhead.*

J. E. A.

1907

May 13, 14.

ANDREW *v.* BRIDGMAN.

Landlord and Tenant—Lease—Covenant not to assign without Consent—Payment for Leave to assign—"Fine or Sum of Money in the Nature of a Fine"—Conveyancing Act, 1892 (55 & 56 *Vict. c.* 13), *s.* 3.

Sect. 3 of the Conveyancing Act, 1892, does not make illegal the demanding of a fine as a condition of giving a licence or consent to the assignment of a lease which contains a covenant against assignment without consent; it merely makes the payment of a fine something not contracted for. The parties to the lease may therefore agree that a fine shall be paid for the granting of the licence.

ACTION tried by Channell J. without a jury.

The plaintiff's claim was for 45*l.*, being a sum which, as he alleged, he paid under protest to the defendant's solicitors under the following circumstances:—By an indenture of lease the defendant let to the plaintiff certain premises in Kentish Town Road, the lease containing the following proviso: "The lessee will not assign, underlet, or part with the possession of the premises or any part thereof without the consent of the lessor first had and obtained." In April, 1906, the plaintiff proposed to assign the lease to one Agate, and asked the defendant to consent to the assignment. She refused to give her consent, except upon the terms that the plaintiff paid her 45*l.* The plaintiff's solicitor protested that this was a demand for a fine or premium for her consent to the assignment, contrary to the provisions of s. 3 of the Conveyancing Act, 1892. (1) The matter

(1) Sect. 3 of the Conveyancing Act, 1892, provides: "In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property

then dropped for a few weeks, and subsequently the plaintiff paid the 45*l.*, and also 5*l.* in respect of the costs of drawing up the licence.

By her defence the defendant denied that the payment was wrongful or contrary to the provisions of s. 3 of the Conveyancing Act, 1892, or that it was paid under protest, and she alleged that the plaintiff was indebted to her in a sum of 10*l.* for an illuminated sign for the premises comprised in the lease, which she said the plaintiff had agreed to take over; that she had paid certain insurance premiums on the contents of the premises for which the plaintiff was liable; and that the 45*l.* was paid in discharge of those claims and also in consideration of her not requiring the plaintiff to make a deposit of 150*l.* as a guarantee for the due execution of certain repairs which she alleged the plaintiff was liable to do under the lease.

On the evidence Channell J. came to the conclusion that the payment of the 45*l.* was not made under protest.

Colam and *Dwyer*, for the plaintiff. This money can be recovered back, as it was a sum which could not validly be claimed from the plaintiff, and which was paid involuntarily and under duress: *Fraser* v. *Pendlebury*. (1) The two cases of *In re Cosh's Contract* (2) and *Waite* v. *Jennings* (3), which may appear to be against the plaintiff's contention as to the effect of s. 3 of the Conveyancing Act, 1892, are not really against it. In *In re Cosh's Contract* (2) Lord Russell of Killowen C.J. pointed out that the sum paid in that case and sought to be recovered back was only paid as a deposit, and was not a payment which transferred the title to the money and enabled the payee to hold it as his own. It was therefore not a fine. In *Waite* v. *Jennings* (3) it

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leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent."

(1) (1861) 31 L. J. (C.P.) 1.

(2) [1897] 1 Ch. 9.

(3) [1906] 2 K. B. 11.

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was the assignee, and not the original lessee, who entered into the covenant sued on, and it was said by Vaughan Williams L.J. that the assignee could not rely on the section, and it was also said by him and Stirling L.J. that money payable under the covenant was not a "fine or sum of money in the nature of a fine" within s. 3.

Schiller, for the defendant. Sect. 3 of the Conveyancing Act, 1892, does not make such a payment as this illegal, as is clear from the language of the section itself, which says that it is to apply unless there is a provision in the lease to the contrary. If a person chooses to make such a payment with full knowledge of the facts the payment is voluntary, and cannot be recovered back even though there be no debt: per Patteson J. in *Cadaval* v. *Collins* (1); and see also per Fry L.J. in *Kearley* v. *Thomson*. (2)

[CHANNELL J. If there is anything in the nature of duress the payment is not voluntary within the meaning of that rule.]

The mere standing on one's rights is not duress. The defendant considered she had a good claim against the plaintiff, and she was entitled to say that she would not grant the licence unless the plaintiff paid her the amount owing by him; there was, therefore, no duress.

Dwyer, in reply. If the contention put forward on behalf of the defendant is right, s. 3 of the Act of 1892 is reduced to a nullity. That section makes such a payment as this illegal or one made without consideration. This is clear by the proviso to the section, which shews what payments are legal.

CHANNELL J. I have felt the greatest difficulty in this case. Sect. 3 of the Conveyancing and Law of Property Act, 1892, says that "in all leases containing a covenant, condition, or agreement against assigning . . . . without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence

(1) (1836) 4 A. & E. 858, at p. 866.

(2) (1890) 24 Q. B. D. 742, at p. 745.

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or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent." In this case there is on the face of the lease a covenant against assignment without consent, and it is unqualified in the way that is frequent nowadays, namely, by a provision that consent is not to be refused in the case of a respectable and responsible tenant; it is thus an absolute covenant against assignment without consent. The section of the Act of 1892 which I have read says that there is to be read into that covenant a proviso "to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent" to any assignment. Supposing these words were actually in this lease, would there be anything to prevent the parties bargaining together as to the terms upon which the consent should be given? I cannot see that there would. The parties may always vary their contract if they like. If a person pays money voluntarily and without consideration, he cannot recover it back; if there is any consideration beyond the mere granting of the licence, the case is stronger. In the present case the defendant had, or thought she had, certain claims against the plaintiff, one of these being in respect of an illuminated sign, but as to that, although she had a grievance, I think she had no legal claim. In reference to the claim as to the insurance premium on the chattels in the premises comprised in the lease, I am inclined to think that she had a good claim against the plaintiff. In these circumstances bargaining took place between the parties upon the matter of the consent to the proposed assignment, and I think there was some consideration in the giving up by the defendant of certain of the claims she was making. I therefore hold that there was consideration for the bargain. I am not sure, however, that that answers the whole question raised in this case. The real question is whether this was a voluntary payment or a payment obtained by duress. In one sense it was a payment by some sort of duress. The plaintiff, who appears to have neglected to look into the lease to ascertain its terms, made a bargain to assign it; subsequently he found that he had to obtain a licence before he could assign. He was thus in a difficulty. If he did not

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get the licence, I suppose he would have been liable in damages to his proposed assignee. In one sense, therefore, there was some pressure; but I think upon the whole that Mr. Schiller is right in his contention that, whilst insisting upon something that one has no right to is duress, the mere standing out for one's rights is not duress. In this particular case the defendant was certainly not obliged to grant a licence to assign unless she chose. In simply saying "I am not going to grant a licence unless for a consideration," she was merely standing upon her rights, and in these circumstances I think that it was not duress. But I am quite conscious that this construction of s. 3 of the Conveyancing Act, 1892, brings it very nearly to a nullity, and I have therefore considerable doubt as to whether my view is right. I can only look at the language used in that section and construe it to the best of my ability. The section says that certain words are to be read into the lease. It does not make the payment of a fine illegal; it simply makes the payment of a fine something not contracted for. The proviso to the section adds nothing to it. As I have said, I have felt considerable doubt about this, but on the whole I have come to the conclusion that the defendant's contention is right.

Judgment for defendant.

Solicitors for plaintiff: *Bowkers.*

Solicitors for defendant: *Godfrey & Webb.*

F. O. R.

CASSWELL *v.* CHESHIRE LINES COMMITTEE.

1907
May 31;
June 3.

Carrier—Railway Company—Passenger's Luggage carried free of Charge—Articles over Value of 10*l.—Liability for Loss—Carriers Act,* 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 68), *ss.* 1, 2.

The provisions of the Carriers Act, 1830, apply to ordinary personal luggage of a passenger which by the regulations of the railway companies he is entitled to have carried free of charge.

Appeal from the Liverpool County Court.

The plaintiff and his wife were passengers travelling over the line controlled by the defendants. They had with them some luggage, including a green canvas box which contained (inter alia) trinkets, lace, silk dresses and silver-mounted articles of toilette amounting altogether to more than 10*l.* in value. No declaration of the articles was made by the plaintiff, and no charge was paid by him in respect of the carriage of the luggage.

By the regulations exhibited by the defendants in their time-tables: "First class ordinary and tourist passengers are allowed 150 lbs., and third class ordinary and tourist passengers are allowed 100 lbs. of personal luggage only (not being merchandize or other articles carried for hire or profit) free of charge. All excess above the weight allowed will be charged for according to the scale. . . . ."

"Ordinary passengers will be allowed to carry with them, at their own risk, free of charge, as passenger's luggage, any goods they may purchase that are bona fide for their own domestic use (other than furniture or musical instruments or similar articles) up to the usual weight allowed free, according to the class they travel."

The plaintiff's luggage was within the weight which, by these regulations, he was allowed free of charge. On arriving at his destination the green canvas box was missing, and the action was brought to recover the value of the box and its contents.

The defendants pleaded a special defence under s. 1 of the Carriers Act, 1830 (1), as to the valuable articles contained in the box.

(1) By s. 1 of the Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), "No mail contractor, stage coach proprietor, or other common carrier

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The judge found that the box was duly placed in the defendants' van and was in their custody at the time of its loss and that the articles the box contained formed the ordinary articles for the plaintiff's use, and were the personal luggage of the plaintiff and his wife. He was of opinion that s. 1 of the Carriers Act, 1830, did not apply to the ordinary personal luggage of the passenger which railway companies within certain specified weights were bound to carry free, and he gave judgment therefore for the plaintiff.

The defendants appealed.

C. A. Russell, K.C. (*J. A. Simon* with him), for the appellants. The county court judge was wrong. The Carriers Act applies to luggage carried with the passenger, and the fact that no direct charge is made for the carriage of the luggage does not make any essential difference: *Pianciani* v. *London and South Western Ry. Co.* (1); *Le Conteur* v. *London and South Western Ry. Co.* (2);

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by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following: (that is to say,) Gold or silver coin of this realm or of any foreign State, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks or timepieces of any description, trinkets, bills, notes of the Governor and Company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10*l.*, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

(1) (1856) 18 C. B. 226.

(2) (1865) L. R. 1 Q. B. 54.

Flowers v. *South Eastern Ry. Co.* (1); *Cohen* v. *South Eastern Ry. Co.* (2); *Macrow* v. *Great Western Ry. Co.* (3); *Dyke* v. *South Eastern and Chatham Ry. Co.* (4)

Cyril Atkinson, for the respondent. The Carriers Act has no application to ordinary personal luggage which by the regulations of the railway companies the passenger is entitled to have carried with him free of charge. The regulation of the railway company amounted to a special contract, which ousted the Carriers Act. The Act only applies where the luggage is carried for hire, and the object of the declaration required by the Act is in order that the carrier may charge a higher rate for the carriage of such articles as are set out in the section. There is no provision at any railway station for passengers to make declarations as to the contents and value of their ordinary personal luggage. [He referred to *Phelps* v. *London and North Western Ry. Co.* (5); *Richards* v. *London, Brighton and South Coast Ry. Co.* (6); *Smith* v. *London, Brighton and South Coast Ry. Co.* (7)]

Russell, K.C., in reply. The railway companies are no doubt bound to carry such ordinary personal luggage free of charge so long as it is under the prescribed weight. But they are not bound to insure it if it contains articles enumerated in the Carriers Act and exceeding the value of 10*l.* They are not liable for the loss of such articles if they are contained in ordinary personal luggage unless a declaration of their value has been made and the other conditions of s. 1 of the Carriers Act have been complied with.

DARLING J. This case raises a question of very great interest to all persons who travel by railway; and, speaking for myself, I must say I think it is a very difficult question to resolve, and I do not for a moment affect to believe that the decision we give to-day will conclude the matter.

The question arises in this way. The plaintiff was travelling with his wife, and in her box she had a variety of things in the nature of jewellery and valuables such as are enumerated

(1) (1867) 16 L. T. (N.S.) 329.
(2) (1877) 2 Ex. D. 253.
(3) (1871) L. R. 6 Q. B. 612.
(4) (1901) 17 Times L. R. 651.
(5) (1865) 19 C. B. (N.S.) 321.
(6) (1849) 7 C. B. 839.
(7) (1849) 7 C. B. 782.

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Darling J.

in s. 1 of the Carriers Act, 1830. No less favourable case could be imagined, I think, for a railway company to fight this question upon than this particular one, because these articles are none of them of any great value, although they are such as are enumerated in s. 1 of the Carriers Act. At the very outside they are worth altogether about 30*l.* Such things as hair brushes are said to be within the section when they have a certain amount of silver on them, such as silver monograms, and there were other little trinkets such as, I think, would be sure to be found in the portmanteau of any lady. That being so, the county court judge has found that these things were all of them "ordinary personal luggage" of the plaintiff and his wife; and as there was evidence before him on which he might so find, we cannot say that he was wrong in that; therefore we must treat this case on the footing that all these things that are said to bring the matter within the Carriers Act are ordinary personal luggage.

The railway company set up s. 1 of the Carriers Act and deny any liability, because these things are over 10*l.* in value, and they are things enumerated in s. 1 of the Carriers Act, and there was no declaration of the things and their value in order that the company might make an increased charge for them. In ordinary circumstances that would be a perfectly good answer, because s. 1 of the Carriers Act is aimed, not only at things sent by train unaccompanied by the passenger, but also at things that are put in the train accompanied by the passenger. The answer of the plaintiff is that the Carriers Act does not apply, because here there was a special contract, and it is perfectly within the competency of persons, who otherwise would be within the Carriers Act, to contract themselves out of that Act. That is plain from s. 6 of the Carriers Act itself, which says: "Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, and any other parties, for the conveyance of goods and merchandizes." I think that they did make a special contract with the plaintiff, which is contained in the time-table: "First class ordinary and tourist passengers are allowed 150 lbs. of personal luggage . . . . free of charge."

There is also an expression in some of the special Acts of Parliament applicable to the cases which provide for the carriage of passengers' luggage free of charge in which the words used are "the ordinary personal luggage"; and that is why the learned county court judge found on the evidence before him, that these things were part of the ordinary personal luggage of the plaintiff and his wife.

Now the contention for the plaintiff is that there was a special contract to carry this luggage free; it was the "ordinary personal luggage of the plaintiff," and therefore if a charge is made for carrying such portions of it as are the kind of things enumerated in the Carriers Act, the luggage is not carried free, which is what the company have contracted to do. I was for some time inclined to think that that was so, but it obviously has never been the opinion of the Courts of Law hitherto.

The point has never been absolutely raised and decided; but it has been decided by implication in the case of *Macrow* v. *Great Western Ry. Co.* (1) The Court there consisted of Cockburn C.J., Blackburn and Mellor JJ. Cockburn C.J. delivered the judgment of the Court, and he says this (2): "The conveyance of the personal luggage of the passenger being obviously for his convenience, and, therefore, accessory, as it were, to his conveyance, it may be thought that the liability of the carrier in respect of the safe conveyance of passengers' luggage should have been co-extensive only with the liability in respect of the safety of the passenger. The law, however, is now too firmly settled to admit of being shaken, that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers." The difference, of course, is that in the one case the company are insurers, and in the other case they are not,—that in the one case the company are liable only if negligence is proved, and in the other case they are absolutely bound to deliver the goods. The Chief Justice says (3): "While the authorities referred to establish that a passenger cannot claim to have carried as ordinary personal luggage articles unconnected with the personal

(1) L. R. 6 Q. B. 612. (2) Ibid. at p. 618.
(3) Ibid. at p. 621.

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use and convenience of the traveller, or, as in *Hudston* v. *Midland Ry. Co.* (1), of such a size and shape as that they cannot reasonably be carried as luggage, we hold the true rule to be that whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament—leaving the carrier herein to the protection of the Carriers Act, to which, being held to be liable in respect of passengers' luggage as a carrier of goods, he undoubtedly becomes entitled—but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying." It is, therefore, perfectly plain that the Court considered that where luggage is being carried free, and where it is the ordinary personal luggage of the traveller, still if it consists in part of such things as are enumerated in the Carriers Act, and that part is over the value of 10*l.*, the protection of the Carriers Act will be given to the railway company, which is exactly what they seek in this case.

Now Mr. Atkinson's answer is that that passage is not necessary to the judgment,—it is obiter dictum. It is no doubt obiter dictum, but obiter dictum of the full Court of Queen's Bench, and we cannot, I think, neglect such an expression of opinion as that. It is true that in the case cited no such special contract was proved as exists here, but after some hesitation I have come to the conclusion that the special contract does not cover this point. The special contract is a contract that the company will allow the traveller so much luggage, free of charge, in this sense: that it shall be carried as far as he goes without charge being made for the carrying of the luggage; but it gives no indication as to whether a charge is, or is not, to be made in respect to anything else.

Now comes s. 1 of the Carriers Act, and that section says:

(1) (1869) L. R. 4 Q. B. 366.

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"No mail contractor, stage coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following" (then it enumerates a lot of things) "contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10*l.*, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package." But the section does not say what the increased charge is for. It does not say it is for carrying; and what has been alluded to in the earlier part of the section is as to the responsibility of the carrier for loss or injury to any article. The words "hereinafter mentioned" refer to s. 2, which says: "When any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of 10*l.*, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers to demand and receive an increased rate of charge," to be notified in a particular way, "as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles." The ordinary rate of charge is nothing at all in this case, because the luggage was carried free. Then what is to be paid, is not to be paid for carriage, but it is to be paid as compensation for the greater risk and care to be taken, not for the conveyance,—the mere transit—but for the "safe conveyance" of the goods.

I come to the conclusion, therefore, that this special contract does not cover the same surface as the sections of the Carriers

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Act which the defendants set up. The special contract relates strictly to the charge for the carriage of the goods. The Carriers Act enables the carrier to make a charge, not for the carriage but as compensation for the greater risk and care to be taken for "the safe conveyance of such valuable articles," and I come to the conclusion, therefore, that the increased charge is not a charge for conveyance at all, but is a charge practically for the insurance of the articles. Therefore, on the whole, I come to the conclusion that the special contract is not inconsistent with these sections of the Carriers Act,—that, these goods not having been declared and an increased charge paid for them, the plaintiff is not entitled to recover, and so this appeal must be allowed.

A. T. LAWRENCE J. I am of the same opinion, and for substantially the same reasons.

It seems to me that the decisions extending over a number of years make it impossible now to say that the Carriers Act does not apply to the personal luggage of the passenger. Then, the Carriers Act applying, the argument is that the special Acts, which deal with the free carriage of the ordinary luggage of passengers, amount practically to a repeal of the protection afforded to the carrier by the Carriers Act, provided that the articles carried are such as would come within the meaning of "ordinary luggage." I think that is not the true interpretation of these Acts or of the contract, which it is admitted was made here pursuant to those Acts, for the free carriage of this particular luggage. I think that it does not mean that the luggage is to be carried free in the most absolute sense; it means that the passenger's fare covers both the carriage of the passenger and of the luggage up to the specified amount. Does that necessarily import that the protection of the Carriers Act is taken away entirely with regard to that luggage? I do not think so. I think that the two things are dealing with different aspects of a carrier's duty. The one is dealing with his duty to carry at all, and the other with the measure of his liability in respect of the carriage. The Carriers Act is provided to qualify the extent of the carrier's liability. It leaves him a common carrier, but it entitles him, in respect of certain articles, to have payment

which is in the nature of a premium to insure their safe carriage. I think the words of s. 2—"as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles"—are words which are applicable to luggage which is "allowed the passenger free of charge" so far as regards the mere carriage. He pays the fare; and if he wishes to have the liability of the carrier as a common carrier in respect of these more valuable articles, he must declare them.

For these reasons I think the appeal must be allowed.

Appeal allowed.

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A. T. Lawrence J.

Solicitors for appellants: *Cunliffes & Davenport, for Lingards & Hamp, Manchester.*

Solicitor for respondent: *C. Dunderdale.*

A. P. P. K.

GLENIE *v.* BRUCE SMITH.

1907

May 16; *June* 11.

Bill of Exchange—Indorsement by way of Security—Circuity of Action—Bill not complete and regular on face of it.

The defendant entered into an agreement with the plaintiff that if the plaintiff would sell some pigs to T. the defendant would guarantee the payment of the price, and for that purpose would indorse bills accepted by T. for the amount. In pursuance of that agreement, T. wrote his acceptances across the face of two blank stamped bill forms, and the defendant indorsed them. T. then handed the bill forms to the plaintiff, who filled up the body of the bills for the agreed amount, making them payable to his order, signed them as drawer, and also indorsed them. The plaintiff duly delivered the pigs to T. In an action against the defendant on the bills:—

Held, (1.) that, having regard to the agreement between the parties, the bills must be treated as though they had been indorsed by the plaintiff to the defendant without consideration, and then reindorsed by the defendant to the plaintiff in consideration of the delivery of the pigs, and that under those circumstances the defendant was, upon the authority of *Wilkinson* v. *Unwin*, (1881) 7 Q. B. D. 636, precluded from setting up the defence that the plaintiff was himself a previous indorser; and (2.) that by reason of the agreement the defendant was also precluded from setting up the defence that at the time the defendant

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indorsed the bills they were not complete and regular upon the face of them.

Jenkins v. *Coomber*, [1898] 2 Q. B. 168, distinguished.

TRIAL before A. T. Lawrence J. in the short cause list.

The action was against the defendant as indorser of two bills of exchange for 91*l.* 9*s.* and 124*l.* 11*s.* respectively. The plaintiffs were the executors of Charles Glenie, deceased. Their testator, Charles Glenie, had on several occasions, previously to the year 1906, sold pigs to one James Tucker, who was the tenant of a farm at Southall belonging to the defendant, and the defendant had, under an oral agreement in that behalf, guaranteed the payment of the price by indorsing Tucker's acceptances. In accordance with the previous course of dealing, Charles Glenie in September, 1906, agreed to sell some pigs to Tucker on the understanding that payment was to be guaranteed by the defendant as before. On September 4 Tucker wrote his acceptance across the face of a blank stamped bill form and handed it to the defendant, who indorsed it. It was then handed to Charles Glenie, who filled up the body of the bill as follows: "One month after date pay to my order the sum of 91*l.* 9*s.*, value received in store pigs," and signed it as drawer. He also wrote his name on the back as indorser. On September 10 Tucker wrote his acceptance across a similar bill form, and procured the indorsement of the defendant, and Charles Glenie then filled up the body of the bill in the same form for 124*l.* 11*s.*, making it payable to his order, and signed it as drawer and indorsed it as before. In the case of the former bill the indorsement of Charles Glenie was written above that of the defendant; in the case of the latter it was written below it. These were the two bills sued upon.

Ernest Todd, for the plaintiffs. The agreement between the parties having been that the defendant should guarantee payment of the bills, it is immaterial to consider the order in which the different signatures were put upon them. They must be treated as if they had been filled up and indorsed by the plaintiffs' testator before they were handed to the defendant for indorsement.

E. A. Harney, for the defendant. The plaintiffs cannot sue the

defendant, for their testator was on their own contention an earlier indorser, and the rule of law is that if a bill be reindorsed to a previous indorser he is precluded from suing the intermediate parties, for they would have their remedy over against him, the object of the rule being to prevent circuity of action. Secondly, the plaintiffs cannot sue the defendant as having incurred the liabilities of an indorser under s. 56 of the Bills of Exchange Act, 1882, for such liabilities are only incurred towards a "holder in due course," that is "a holder who has taken a bill complete and regular on the face of it"; and that the plaintiffs' testator was not. For at the time that he took the bills they were not bills at all, but merely pieces of stamped paper bearing the name of Tucker as acceptor and that of the defendant as indorser. The case of *Jenkins & Sons* v. *Coomber* (1) is in point. There it was agreed between the plaintiffs and the defendant's son, who owed them money, that they should draw a bill on him, and that the defendant should indorse it to guarantee payment. They accordingly drew a bill on the son payable to their own order, and without indorsing it handed it to the son, who returned it to them accepted by himself and indorsed by the defendant. The plaintiffs subsequently indorsed it. It was held that the defendant was not liable, as at the time he indorsed it it was not complete and regular on the face of it, as it lacked the plaintiffs' indorsement.

Ernest Todd, in reply. The rule that the holder cannot sue an indorser if he was himself a prior indorser of the bill only applies where the defendant has given value for it and has a right of action over against the holder. Where, as in the present case, he has given no consideration for the indorsement to him, and has consequently no right of action against the holder, the objection of circuity of action does not arise: *Wilkinson* v. *Unwin*. (2) Upon the other point the case of *Jenkins & Sons* v. *Coomber* (1) is distinguishable, for in that case there was no sufficient evidence that the defendant agreed to guarantee payment of the bill; and even if there was such evidence the point was not taken that the defendant was estopped by the agreement

(1) [1898] 2 Q. B. 168. (2) (1881) 7 Q. B. D. 636.

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from disputing that the bill was complete and regular at the time he indorsed it.

Cur. adv. vult.

June 11. A. T. LAWRENCE J. read the following judgment:

The plaintiffs sue on two bills of exchange. The plaintiffs are the sons and executors of the drawer, Charles Glenie. The defendant is sued as indorser of both bills. The facts appear to have been these: One Tucker, who is the acceptor of the bills, was a farmer and tenant of the defendant. In 1903 Tucker, who had swine fever upon his farm, was in financial difficulties, and was indebted to the defendant for rent and otherwise. The deceased Charles Glenie had for some years had transactions with Tucker in pigs, Tucker's farm being what he called a "pig farm." In consequence of Tucker being unable to pay for some pigs he had bought from Glenie, it was suggested that Tucker should get his landlord, the defendant, to back a bill for the price of the pigs. One of the plaintiffs on behalf of his father saw the defendant and asked him whether he was prepared to become responsible for the price of pigs to be delivered to Tucker. The defendant said that he was, and expressed great confidence in Tucker's future success, and he indorsed bills for the amount of the price of the pigs. This occurred in 1903. In the years from 1903 to 1906, both inclusive, many transactions took place upon this footing. In each case the acceptance by Tucker and the indorsement by the defendant were placed on a blank bill form. This form was then handed to the deceased for the purpose of his getting it filled up as a bill of exchange. The body of the bill was afterwards filled up by the deceased Charles Glenie. These bills until 1906 were duly met, and no question arose upon them. In September, 1906, the two bills now in question were so given. The one was filled up for 91*l.* 9*s.*, and the other for 124*l.* 11*s.*, with the deceased's name as drawer, and in the case of the latter with his name as indorser placed below that of the defendant instead of above it. Whether or not the deceased had made the previous bills in the same form did not appear.

It was urged that Charles Glenie, being the drawer of the bills, could not sue the defendant, but I think that, as the bills were

indorsed in pursuance of the agreement above mentioned, and were made out with the defendant's authority, he cannot set up this defence. It seems to me that as to the bill for 91*l.* 9*s.* the case of *Wilkinson* v. *Unwin* (1) is directly in point. This bill on inspection would appear to have been indorsed by the deceased to the defendant and reindorsed by the defendant to the deceased. The defendant could not set up the defence of circuity of action, for there was no consideration for any indorsement by the deceased to him, and there was never in fact a time at which he could have sued the deceased upon this bill. *Wilkinson* v. *Unwin* (1) was after *Steele* v. *M'Kinlay* (2), which was cited to and considered by the Court of Appeal. With regard to both of these bills I think the facts of this case differ materially from those of *Steele* v. *M'Kinlay*. (2) In that case no agreement by James M'Kinlay to become liable for the money advanced was ever proved, nor was it proved that the money was advanced upon the faith of his being liable for the loan either primarily or as a guarantor of his sons. In this case I am satisfied that the defendant did agree to become liable for the price of these pigs, and that the transactions in pigs had for several years proceeded upon the faith of that promise. The particular pigs for the price of which these bills were given would never, in my judgment, have been sold or delivered but for the reliance placed by the deceased upon the defendant's promise.

It was then urged that the bill, having been indorsed in blank, was invalid. I think the defendant is equally estopped from setting up this defence. The foundation of the whole transaction was the agreement to be responsible for the price of the pigs delivered upon the farm. When the defendant said, as he did in his evidence, that he knew and intended the bills to be filled up by the deceased, and also said that he did not regard his signature as the indorsement of a bill and thought there would be no liability under it, I regret to say I cannot accept the latter part of his statement. He admitted that he had had bill transactions before, and that he meant the deceased to raise money on them by discounting them with bankers. I fear he is now taking advantage of the loose manner in which the deceased, who

(1) (1881) 7 Q. B. D. 636. (2) (1880) 5 App. Cas. 754.

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appears to have been an unskilled person, completed the documents. *Matthews* v. *Bloxome* (1) is a similar case to this. It is true that Lord Blackburn in *Steele* v. *M'Kinlay* (2) expresses some doubt about that case (to which he had been a party), and says it "can only be an authority for considering a bill as if it were amended so as to be what it was intended to be, when the evidence is clear what the intention was, and that the bill was drawn up in its actual form by blunder." That is precisely what happened here. The defendant authorized a good bill to be filled up, giving the deceased security for the price of the pigs. The deceased duly delivered the pigs, but filled up the bills in a form which was a blunder, and which has given rise to this action.

I think the bill for 124*l.* 11*s.* must be read with the other as though indorsed to the defendant by the drawer and reindorsed by the defendant to the deceased for value received in the shape of pigs sold to the former pursuant to his request.

The case of *Jenkins & Sons* v. *Coomber* (3) was relied upon by the defendant, but the facts there were different: the indorsement was not upon a blank bill form, and there was no authority by the indorser to the plaintiffs to indorse or do any other subsequent act. There was no agreement by the defendant to guarantee the debt of his son unless it could be inferred from his writing his name upon the bill, and this it could not be.

My judgment must be for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Woodbridge & Sons.*
Solicitors for defendant: *Swann, Bradley & Co.*

(1) (1864) 33 L. J. Q. B. 209. (2) 5 App. Cas. 754.
(3) [1898] 2 Q. B. 168.

J. F. C.

FARNDALE *v.* DILLON.

1907
June 13.

Licensing Acts — Intoxicating Liquors — Sale to Children — Prohibition of — Exceptions — Intoxicating Liquors (Sale to Children) Act, 1901 (1 *Edw.* 7, *c.* 27), *s.* 2.

Sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, provides that every person who knowingly sends a child under the age of fourteen years to a public-house for the purpose of obtaining any description of intoxicating liquor, "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint," shall be guilty of an offence:—

Held, that the mere fact that the vessel with which a child is sent to fetch liquor is capable of being corked and sealed by the vendor after being filled is not enough to bring the sender within the exception.

Per LORD ALVERSTONE C.J.: There must be evidence that the sender intended that the vessel in which the liquor was to be delivered to the child should be corked and sealed before delivery.

Per DARLING and A. T. LAWRENCE JJ.: The exception applies only to the case of liquor which is sold in a corked and sealed vessel belonging to the vendor, and the purchaser is not entitled to send a child with an empty bottle in which to fetch the liquor, whether intended to be corked and sealed or not.

Semble, that the sending of a child for less than a reputed pint, although to be purchased in a corked and sealed vessel, would be an offence within the section.

CASE stated by justices of Bradford.

An information was laid by the chief constable of Bradford under the Intoxicating Liquors (Sale to Children) Act, 1901, s. 2 (1), against the respondent Henry Dillon, charging that he, on January 19, 1907, did knowingly send one Joseph Dillon,

(1) By s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901: "Every holder of a licence who knowingly sells or delivers . . . . any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only, shall be liable to a penalty . . . . and every person who knowingly sends any person under the age of fourteen years to any place where intoxicating liquors are sold or delivered or distributed for the purpose of obtaining any description of intoxicating liquor, excepting as aforesaid, for consumption by any person on or off the premises, shall be liable to like penalties."

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then being under the age of fourteen years, to the White Swan Inn for the purpose of obtaining beer, the same not being sold to the said Joseph Dillon in a corked and sealed vessel in quantity not less than one reputed pint for consumption off the premises only.

At the hearing of the information the following facts were proved or admitted :—

On January 19 the respondent sent his son Joseph Dillon, a boy aged twelve, to the White Swan Inn, Lumb Lane, in the said city, with a pint bottle for the purpose of obtaining half a pint of beer for consumption off the premises, that the boy entered the White Swan Inn, and after being there about a minute came out carrying a pint bottle which contained half a pint of beer, and which was corked, but not sealed.

The appellant's solicitor contended that the respondent, knowing the boy to be under fourteen years of age, committed an offence by sending him for the beer to be sold or delivered in a vessel which was not corked and sealed. No point was raised on the hearing as to the quantity of the liquor sent for.

The justices were of opinion—

(1.) That in sending a vessel capable of being corked and sealed the respondent did all that he could to observe the law;

(2.) That so far as the respondent was concerned, and on the point raised, the case came within the exception in s. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, and that the offence, if any, was attributable to the person supplying the liquor in not corking and sealing the vessel after the liquor had been put in, and that, as the vessel which the respondent sent was capable of being corked and sealed, he was not liable for the neglect or default of the person supplying the liquor in not corking and sealing the vessel;

(3.) That the intention of the statute was to prevent the sending of children to obtain intoxicating liquors in such vessels as jugs or cans which were not capable of being corked and sealed.

They accordingly dismissed the information, subject to a case for the opinion of the Court.

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Scarlett, for the appellant. The respondent did not bring himself within the exception, and for two reasons—first, he sent for less than a reputed pint, and it is an offence for the vendor to sell, and for the purchaser to send for, less than a reputed pint even if it is to be delivered to the child in a sealed vessel; and, secondly, it is the duty of the sender to see that the bottle in which the liquor is put is sealed before delivery to the child: he is not entitled to trust to the vendor doing his duty in that respect.

No counsel appeared for the respondent.

LORD ALVERSTONE C.J. This case must go back to the magistrates to be dealt with on the merits. I greatly doubt whether there was here any evidence that the boy, who was sent with an empty bottle, was sent for the purpose of getting beer delivered to him in a corked and sealed vessel. Further, I doubt whether Mr. Scarlett is not right in saying that a person cannot claim the benefit of the exception unless he can shew a literal compliance with its provisions, including the requirement that the quantity sent for shall be not less than one reputed pint. On both those points, that the father sent the boy with an empty bottle to get the liquor, and that he sent him to get less than a reputed pint, the case must go back to the magistrates to be heard and determined.

DARLING J. I am of the same opinion. I think the reasons given by the magistrates for refusing to convict are not sound. The statute says that a person commits an offence who "knowingly sends any person under the age of fourteen years to any place where intoxicating liquors are sold or delivered . . . . for the purpose of obtaining any description of intoxicating liquor excepting as aforesaid"; and the exception there referred to is, "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint." I think this means that the sender, in order to come within the exception, must send the child for a pint at least of some such intoxicating liquors as are ordinarily sold in corked and sealed vessels, such as a pint of champagne or of bottled

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beer. He must not send for less than a reputed pint. And further he must not send the child with a bottle which has to be corked and sealed by the seller after being filled.

A. T. LAWRENCE J. I am of the same opinion. In my opinion the statute meant that a child should not be sent for any liquor which is not sold in corked and sealed bottles.

Case remitted to justices.

Solicitor for prosecutor: *F. Stevens, Town Clerk, Bradford.*

J. F. C.

C. A.

1907

June 14, 15.

[IN THE COURT OF APPEAL.]

LANCASTER RURAL DISTRICT COUNCIL *v.* FISHER AND LE FANU.

Highway—Repair—"Extraordinary Traffic"—"Extraordinary Expenses"—Limitation of Time for bringing Action—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1.

By the Locomotives Act, 1898, s. 12, sub-s. 1 (*a*), extraordinary expenses incurred by a highway authority in repairing a highway by reason of damage caused by extraordinary traffic thereon are recoverable by an action in the High Court or county court, and by sub-s. 1 (*b*) proceedings for the recovery of such expenses "shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work."

It being conceded, having regard to *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, that where the damage was caused by work done under a building contract, or work extending over a long period, an action for recovery of expenses was in time if brought either within twelve months of the doing of the damage, or within six months after the completion of the contract or work:—

Held, that "the completion of the contract" meant the completion of the contract so far as it related to the work causing the damage which gave rise to the action.

Therefore where the damage was caused by work done under a contract which the Court assumed to be a building contract, and the contract contained a maintenance clause which provided that the entire

work should be at the risk of the contractor for a certain period after completion :—

Held, that the contract was completed, within the meaning of sub-s. 1 (*b*), at the date of the completion of the work, and that the six months began to run from that date.

APPEAL from a decision of Bigham J.

The action was brought under the Highways and Locomotives (Amendment) Act, 1878, s. 23, as amended by the Locomotives Act, 1898, s. 12, for extraordinary expenses incurred by the plaintiffs as the road authority in repairing certain highways in their district by reason of the damage caused by extraordinary traffic thereon, the damage being caused by the haulage of waterpipes along the roads in question by the defendants.

The work causing the damage, which extended over several months, was done by the defendants under a contract entered into between them and the Manchester Corporation on May 26, 1902, whereby they contracted to lay and joint certain waterpipes for the corporation in connection with the construction of the Thirlmere Aqueduct second line of pipes from Ambleside to Brook. This contract contained a maintenance clause which provided that the entire work should be at the risk of the contractors until the expiration of twelve calendar months from the date which should be certified by the engineers as that on which the work should be fully completed and tested to their satisfaction.

The principal defence was that the action was not commenced within the time limited by s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898. (1) The writ in the action was issued on May 20, 1905. The greater part of the damage complained of occurred prior to May 20, 1904, the haulage of pipes ended at the latest in

(1) Sub-s. 1 of s. 12 of the Locomotives Act, 1898, which amends s. 23 of the Highways and Locomotives (Amendment) Act, 1878, provides, so far as material, as follows :—

"(*b*) Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work."

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August, and the entire work was completed on October 31, 1904, and the water run through the pipes on November 1.

It was arranged between the defendants and the Manchester Corporation that the period of maintenance should commence on that date, although in point of fact the engineers never formally certified that the work was completed to their satisfaction.

Bigham J. was of opinion, upon the construction of clause (*b*) of sub-s. 1, that the twelve months limit applied only to a case where the damage arose from circumstances of short duration, and that this case was governed by the latter part of the clause; and he held that the contract of May 26, 1902, was a building contract, and also that the work in question was work extending over a long period; and, having regard to the terms of the maintenance clause in the contract, he thought that the contract or the work was not complete until the possibility of further work being done under the contract was at an end. He therefore held that this action was not out of time, and he gave judgment for the plaintiffs for 500*l*.

The defendants appealed.

Sanderson, K.C., and *Wingate-Saul*, for the defendants. The object of the amendments introduced by s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898, was to force the road authority to do the work of repairing in such a reasonable time that they could bring their action within twelve months of the damage being done. The meaning of the sub-section is this: The statutory limitation is intended to be twelve months from the doing of the damage, but the statute contemplates the possibility that the work causing the damage might go on continuously for more than twelve months, so that, as to part of the damage, the action could not be brought within the twelve months limit; and to meet such a case it extends the period within which the action can be brought, and says that it may be brought within six months after the completion of the work, or where the damage is the consequence of a building contract within six months after the completion of the contract. Bigham J. thought that the first part of the sub-section did not apply to this case, and he has placed a construction upon the second part which is inconsistent with the view of the Court

of Appeal in *Kent County Council* v. *Folkestone Corporation* (1), which was not cited to him. He has held that this damage was caused by work done under a building contract within the meaning of sub-s. 1 (*b*), and that by reason of the existence of the maintenance clause the completion of the contract or the work, from which the six months begins to run, dated not from the time when the work was actually completed, but from the end of the period of maintenance, and that consequently this action was not out of time. The contract in this case is not a building contract, but assuming that it was, the contract was completed when the work under it was completed, and that was more than six months before the commencement of this action. If this is to be regarded as work extending over a long period, the completion of the work in sub-s. 1 (*b*) means the completion of the work which has caused the damage: per Romer L.J. in *Kent County Council* v. *Folkestone Corporation*. (2) Upon either view of the case this action is out of time, except so far as any item of damage arose within twelve months of the commencement of the action.

[They were stopped.]

Taylor, *K.C.*, and *Edmund Sutton*, for the plaintiffs. This was work done under a building contract within the meaning of this enactment, and it was all done under one contract. That distinguishes this case from *Kent County Council* v. *Folkestone Corporation* (1), where there were two distinct works under separate contracts, and the damage was caused by one only. The question is whether this contract is completed when the work has been done or only when the period of maintenance has elapsed. The more reasonable view is to hold that the contract is not complete so long as the work is at the contractor's risk. [They referred to *Cunliffe* v. *Hampton Wick Local Board*. (3)]

COZENS-HARDY M.R. With great respect to the learned judge, I think he has taken a wrong view of this section. The point is really an exceedingly short one. Damage was caused to a road by extraordinary traffic, that extraordinary traffic being the haulage of pipes. That haulage ended in either July or

(1) [1905] 1 K. B. 620.
(2) [1905] 1 K. B. 620, at p. 634.
(3) (1893) Hudson on Building Contracts, vol. 2, p. 274.

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August, 1904, but for the present purpose it does not matter which it was. The work was completed in this sense, that the water began to run through the pipes on November 1, 1904, and the work must have been completed in the ordinary sense, therefore, on October 31 or November 1, 1904. The writ was not issued until May 20, 1905, and it is said that, although more than six months had elapsed after the completion of the work, you are entitled to look at the contract under which the work was done, and because you find there that certain obligations imposed upon the contractor are extended to twelve months after completion by virtue of what is commonly known as a maintenance clause, therefore it cannot be said that the contract had ended, and therefore this action was in time. I do not think it is necessary to say whether a contract of this kind is a building contract within the meaning of the section. I assume, without deciding, that it is. On that assumption I think we must read the section in this way: that, given a building contract and damage caused by work under that contract, the six months will not begin to run until after the completion of that contract so far as it relates to the work causing the damage which gives rise to the action. To say that you have to wait until all the other stipulations of the contract are fulfilled seems to me to be putting an entirely unnatural and almost absurd construction upon the Act, which I do not feel in any way bound to adopt. If the other view is correct, that this is not a building contract, but a work extending over a long period, exactly the same considerations apply, with perhaps increased force. Then the time begins to run from the completion of the work, that is, the completion of the work causing the damage which gave rise to the cause of action. I think, with the greatest possible respect to the learned judge, that he was wrong in the view which he took, and that the period of limitation had passed, and that the objections taken by the defendants are well founded.

SIR GORELL BARNES, PRESIDENT. I agree. I only wish to put very shortly the way in which the matter strikes me. If the question of the six months depends upon the words "work extending over a long period" and the completion of that work,

I cannot see how the plaintiffs can maintain their point. If, on the other hand, the case depends on the words "damage in consequence of any particular building contract," and the six months is to count from after the completion of the contract, then the question arises, What is reasonably meant by "the completion of the contract" under that section? In saying this, I am, of course, not deciding, as the Master of the Rolls also did not decide, whether this in fact was a building contract or not. Even supposing it were, the completion of the contract, as it seems to me, must reasonably be read as completion so far as the work which does the damage is concerned, because otherwise one might be led into all sorts of difficulties by clauses in a contract which might for many purposes be introduced and for such purposes might extend the time during which the contract was current for some very long period. Take, for instance, the case of deferred payments. The contract is not at an end until the last payment is made. In this particular case the only thing which can be suggested as extending the contract is this continuation clause. There, again, one can conceive certain classes of work where the maintenance clause might run on for very many years after the work is completed. It seems to me that it is unreasonable to construe the section in the way suggested by the plaintiffs. Completion really means completion of the actual work that has got to be done, although it is possible that something might have to be done at some future time to keep that work in order. I agree with the view taken by the Master of the Rolls, and that the appeal ought to be allowed.

KENNEDY L.J. I agree with both the judgments, and have nothing to add.

COZENS-HARDY M.R. There will be a declaration that the defendants are not liable, except for such portion of the total damage, which has been assessed at 500*l.*, as has been occasioned since May 20, 1904.

Appeal allowed.

Solicitors: *Arkcoll, Cockell & Co., for J. T. Sanderson, Lancaster; Gibson & Weldon, for Johnson & Tilly, Lancaster.*

H. B. H.

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May 3.

BYFORD *v.* RUSSELL; MORRIS, CLAIMANT.

Sheriff—Execution—Building Agreement—Plant on Premises—Lien of Building Owner—Seizure by Sheriff—Priority.

By a building agreement it was provided that if the builder should neglect to proceed with due diligence in the performance of the work the building owner should be at liberty to give notice in writing to the builder requiring him to proceed with the work with reasonable despatch, and that from the date of such notice the builder should not be at liberty to remove from the premises any plant belonging to him placed there for the purposes of the works, and that the building owner should have a lien upon such plant thenceforward until the notice was complied with.

A judgment having been recovered by a third person against the builder, the sheriff entered under a fi. fa., and seized in execution of the judgment certain plant belonging to the builder which had been brought by him to the premises for the purposes of the work. After the seizure by the sheriff, and while the plant was still on the premises and unsold, the building owner gave to the builder, who had not proceeded with due diligence in the performance of the works, notice under the contract to proceed therewith, and he thereupon claimed as against the execution creditor a lien on the plant:—

Held, that the intervening seizure by the sheriff prevented the building owner's right of lien under the notice from taking effect.

APPEAL from the Shoreditch County Court.

By a building agreement dated June 22, 1906, and made between David Morris, the building owner, therein called the "employer," and J. Russell, builder, therein called the "contractor," it was provided (inter alia) as follows:—

"If the contractor . . . . shall neglect or fail to proceed with due diligence in the performance of his part of the contract . . . . the employer shall have power to give notice in writing to the contractor requiring that the works be proceeded with in a reasonable manner and with reasonable despatch. . . . . After such notice shall have been given the contractor shall not be at liberty to remove from the site or works any plant or materials belonging to him which shall have been placed thereon for the purposes of the works, and the employer shall have a lien upon all such plant and materials to subsist from the date of such notice being given until the notice shall have been complied with."

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After the works under the contract had been begun a judgment was obtained by the plaintiff Byford against Russell, the builder, and on October 6, 1906, the sheriff entered upon the building premises and seized under a fi. fa. in execution of the judgment the building plant and materials belonging to Russell which he had brought there for the purposes of the works. Two days afterwards, on October 8, while the plant was still upon the premises and unsold, Morris, the building owner, gave to Russell, who had not been diligent in the performance of the contract, notice under the above clause to proceed with the works. Morris then claimed that by virtue of the said notice he was entitled to a lien upon the plant, and that the sheriff was not at liberty to proceed with the execution. The sheriff interpleaded. On the hearing of the interpleader issue the county court judge gave judgment for the execution creditor. The claimant appealed.

Bousfield, K.C., and *Sanders*, for the claimant. The sheriff under a fi. fa. can levy execution only upon the judgment debtor's interest in the goods. He can take no more than the debtor has got, and if the goods are subject to a burden in favour of a third person he can only sell them subject to that burden. Here at the time of the seizure the goods were subject to the contingent right of the claimant to confer upon himself a lien by giving the builder notice to proceed with the works. Upon the notice being given the lien at once became operative, and if the sheriff sold the plant the purchaser could not remove it from the premises until the works were completed. In *Ex parte Newitt, In re Garrud* (1) a building agreement between a land-owner and a builder provided that upon default of the builder in performing his part of the contract the land-owner might re-enter, and that on such re-entry all the building materials then upon the premises should be forfeited to and become the property of the land-owner, and it was held by the Court of Appeal that, the interest of the builder in the materials being defeasible, the right of the land-owner to seize was not defeated by the commission of an act of bankruptcy by the builder before the seizure was made. So here the right of the builder to remove the plant was defeasible by

(1) (1881) 16 Ch. D. 522

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the giving of the notice at any time before the plant had been actually removed, and was unaffected by the intervening seizure by the sheriff. The case of *In re Keen, Ex parte Collins* (1) is to the same effect. There a building agreement between a firm of builders and a school board contained a similar clause that if the builders delayed the performance of the contract the board might give the builders notice to proceed with the work, and that in the event of their not doing so for seven days the plant should be forfeited to the board. The builders became bankrupt, and the board subsequently to the commencement of the bankruptcy gave to the builders and to the trustee notice to proceed with the work, but the work was not proceeded with. The board claimed that the plant on the premises was forfeited. It was held that the trustee, when his title to the goods accrued, took them subject to the contingency of that title being determined by forfeiture, and that, that contingency having happened, the board were entitled to the plant as against the trustee. That then being the effect of such a notice as between building owner and trustee in bankruptcy, the same result must follow as between building owner and execution creditor so long as the goods remain on the premises. The sheriff, by seizure under a fi. fa., takes no property in the goods; he only takes possession. In *Giles* v. *Grover* (2) it was held by the House of Lords that goods of a debtor already seized under a fi. fa., but not sold, may be taken under a writ of extent. Lord Tenterden there said (3): "It has been supposed by some that the property is in the judgment creditor; but it is perfectly clear, upon consideration of the subject, that the judgment creditor has no property in the goods while they remain in the hands of the sheriff. If the sheriff executes the process of the Court, and makes a bill of sale to the plaintiff in the action, then the judgment creditor obtains the property; but until that is done, while the goods are in the possession of the sheriff they are in the custody of the law, but still remain the property of the debtor to whom they originally belonged." In *Whitworth* v. *Gaugain* (4) Wigram V.-C. said that "a creditor might, under

(1) [1902] 1 K. B. 555.
(2) (1832) 9 Bing. 128, at p. 280.
(3) Ibid. at p. 280.
(4) (1844) 3 Hare, 416.

his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor subject to every liability under which the debtor himself held it." And in *Wickham* v. *New Brunswick and Canada Ry. Co.* (1) Lord Chelmsford said: "There is no doubt upon principle, as well as on the authority of the cases cited in the argument at the bar, that the right of a judgment creditor under an execution is to take the precise interest, and no more, which the debtor possesses in the property seized, and consequently that such property must be sold by the sheriff with all the charges and incumbrances, legal and equitable, to which it was subject in the hands of the debtor. In other words, what the debtor has power to give is the exact measure of that which the execution creditor has the right to take." Here the debtor held the goods subject to the liability of the claimant's creating a lien in his favour by giving notice under the contract at any time while the goods remained on the premises. That liability consequently continued to attach to the goods in the hands of the sheriff.

Bartley, for the execution creditor, was not called upon.

PHILLIMORE J. I am of opinion that this appeal must be dismissed. Under the terms of the building agreement the building owner could, upon giving a notice to the builder to proceed with the work, obtain a lien on the plant belonging to the builder and then being on the premises. And after that notice had been given the sheriff, in execution of a judgment against the builder, could seize only subject to that lien. But until the notice was given the building owner had no lien on the plant, nor any right to possession of it, nor interest in it whatever. Here before notice was given the sheriff seized, and after a seizure by the sheriff it was no longer competent for the building owner to acquire a lien by giving notice. Such a notice given subsequently to seizure was inoperative to defeat the interest of the judgment creditor.

BRAY J. I am of the same opinion. The building owner had no interest in the goods till he had given the notice provided by

(1) (1865) L. R. 1 P. C. 64.

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the agreement. When he did so he would have a right to prevent the builder from removing them from the premises. But the sheriff seized two days before the notice was given. It was then too late to give it.

Appeal dismissed.

Solicitors for claimant: *Bramall & White.*
Solicitors for judgment creditor: *Downer & Johnson.*

J. F. C.

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April 17.

WHITTUCK *v.* WITHY.

Licensing Acts—Application for grant of New Licence—Claim by Clerk to Justices to Fees in respect of Witnesses called in Opposition to Grant—Justices' Clerks Act, 1877 (40 *&* 41 *Vict. c.* 43), *s.* 8—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 15.

Sect. 15 of the Alehouse Act, 1828, which provides the sums which are payable by the person to whom a licence is granted, is exhaustive. Therefore the clerk to the justices of a petty sessional division is not entitled to receive a fee for the administration of the oath to a witness called at an adjourned annual licensing meeting of the justices to give evidence in opposition to an application for the grant of a licence.

APPEAL by Whittuck, the plaintiff, from a judgment of the judge of the county court of Somersetshire, sitting at Bath.

The action was brought by the plaintiff, in his capacity of clerk to the justices of the Weston (Bath) petty sessional division of the county of Somerset, to recover the sum of 4*s.*, being the fees he alleged were authorized by a table of fees duly made and certified for the county of Somerset in pursuance of s. 8 of the Justices' Clerks Act, 1877, in respect of four witnesses who were called by the defendant at the further adjourned annual licensing meeting of the justices held at Weston on March 3, 1906, and gave evidence in opposition to an application made on behalf of the Bath Brewery Company, Limited, by one Hibbard for the grant of a provisional full licence for premises intended to be erected at Twerton, Bath, under the Alehouse Act, 1828, as amended by subsequent Acts.

Four persons residing, or owning property, near the proposed

new premises attended the meeting for the purpose of objecting to the grant on public grounds and of giving information to the Court to enable it to rightly exercise its discretion whether to make the grant or not. The defendant Withy appeared thereat as their solicitor.

At the request of the applicant Hibbard six witnesses were called, and were duly sworn and gave evidence. The four objectors to the grant were also duly sworn or affirmed, and gave evidence objecting to the grant. The justices decided to make the grant applied for.

The applicant for the licence paid to the plaintiff 7*s.* 6*d.*, being the fees allowed by s. 15 of the Alehouse Act, 1828, and 1*s.* as prescribed by s. 36 of the Licensing Act, 1872, but no other fees.

The plaintiff sought to recover the sum of 4*s.* as fees payable in respect of the administration of the oaths or affirmations to the four objectors to the grant.

For at least fifteen years last past it had not been the practice of the clerk to the justices of the petty sessional division to demand or receive a fee for administering the oath to a witness upon an application for a licence.

For the purposes of this action the defendant accepted such liability for the fees as might be adjudged to rest upon the four objectors or either of them.

A table of fees to be taken by the clerks to the justices for the county of Somerset had been made by the standing joint committee of the quarter sessions and the county council on April 7, 1902, and certified by a Principal Secretary of State, pursuant to s. 8 of the Justices' Clerks Act, 1877. Among those fees on the 1st page of the table of fees were the following:—

	s.	*d.*
"HEARING.—When no conviction or order is made .	1	0
INFORMATION. — Each information or examination (including oath)	1	0
LICENCE.—For every occasional licence . . .	2	6
For every licence, consent, or authority, not otherwise provided for, to include registration when necessary	2	6

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	s.	d.
LIST.—Every list which it is the duty of the clerk to the justices to make	1	6
NOTICE.—Every notice not otherwise provided for .	1	0
OATH.—Every oath, affirmation, or solemn declaration, not otherwise charged	1	0"

Fees to the clerks were also included in respect of matters not necessarily performed by justices in petty or special sessions, e.g., 1*s.* on the issue of a summons.

There was a note at the bottom of the page that "Nothing herein contained shall be construed to authorize the demand of any fee contrary to the provisions of any Act of Parliament now or hereafter to be passed. . . . ."

A list of fees, the amount of which was fixed by statute, was separately set out on the 2nd page. This list included the following fees:—

	s.	d.
"LICENCES.—For grant, renewal, or transfer of a licence to keep an alehouse and victualling house (to include fee of 1*s.* 6*d.* for preparation of precepts and notices, and fee of 1*s.* to constable for serving notices), 9 Geo. 4, c. 61, s. 15 . .	7	6
For grant or transfer of certificate under the Wine and Beerhouse Acts (to include fee for preparation of precepts and notices, and fee to constable as above), 33 & 34 Vict. c. 29, s. 4 . . .	7	6
For renewal of certificate under the Wine and Beerhouse Acts (to include fee of 1*s.* to constable for serving notices), 33 & 34 Vict. c. 29, s. 4 . . .	5	0
For registering any grant or renewal, 35 & 36 Vict. c. 94, s. 36	1	0
For inspection of register and taking copy or extract from register, 35 & 36 Vict. c. 94, s. 36 . .	1	0
For certified copy of licence under 5 & 6 Vict. c. 44, s. 3	2	6
For endorsement of same	2	6
Billiard licence (to include fee of 1*s.* to constable), 8 & 9 Vict. c. 109, s. 10	6	0

	s.	d.
Theatre licence (6 & 7 Vict. c. 68, s. 6), for each month for which theatre is open, not exceeding .	5	0
Registration of music and dancing licence (53 & 54 Vict. c. 59, s. 51)	5	0"

The county court judge held that there was no liability on behalf of anyone opposing the grant of a new licence to pay a fee on the administration of the oath either under s. 8 of the Justices' Clerks Act, 1877, the Summary Jurisdiction Act, 1879, s. 15 of the Alehouse Act, 1828, or under the common law, and accordingly gave judgment for the defendant. The Justices' Clerks Act, 1877, s. 8, provides, "Where it appears to a local authority that the aggregate amount received by the treasurer of that authority in respect of court fees unduly exceeds or unduly falls below the aggregate amount paid by that authority by way of salary to the clerks of petty sessional divisions, ... or that otherwise it is expedient so to do, the local authority may make a table of the court fees which in their opinion should be taken, and shall cause such table . . . . to be laid before a Secretary of State, and a Secretary of State may, if he thinks fit, alter such table of fees, and settle the same . . . . , and certify that the fees in the table as settled by him are proper to be taken within the jurisdiction of the said local authority. . . . . A Secretary of State, upon certifying a table of fees in pursuance of this section, shall cause copies thereof to be sent to the clerk of the local authority to be by him distributed to the clerks of petty sessional divisions and clerks to justices within the jurisdiction of that authority, and if at any time thereafter any of those clerks or any other person wilfully demands or receives any other or greater court fee than such as is set down in the said table, he shall forfeit for every such demand or receipt twenty pounds. . . . . The expression 'court fee' in this section means any fee, gratuity, or sum which may by law be demanded or received in respect of any business or act transacted or done by a clerk of special or petty sessions or a clerk of justices of the peace as such clerk. . . . ." Sect. 15 of the Alehouse Act, 1828, provides that "It shall be lawful for the clerk of the justices, as well at the general annual licensing meeting as also at any special session to be holden under this Act, to demand and receive from

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every person to whom a licence shall be granted under this Act for the trouble of such clerk, and for all expenses connected therewith, the sums following and no more; videlicet . . . . And every such clerk, who shall demand or receive from any person for such respective fees in this behalf any greater sum or anything of greater value than the sums hereinbefore specified, being in the whole the sum of 7*s.* 6*d.*, shall for every such offence, on conviction before one justice, forfeit and pay the sum of 5*l.*"

Avory, K.C., and *Garland*, for the plaintiff. A witness who is sworn is liable to pay the fee to the clerk to the justices. The clerk to the justices was originally paid by fees. The Criminal Justice Administration Act, 1851 (14 & 15 Vict. c. 55), provided that he should be paid by salary, and that the fees should go to the standing joint committee of quarter sessions. The fees sued for are chargeable under the item "Oath.—Every oath, affirmation, or solemn declaration, not otherwise charged" in the Table of Fees of April 7, 1902. The Justices' Clerks Act, 1877, s. 8, made the alteration with regard to the clerks' fees compulsory. Before that it was optional. The local authority mentioned in that statute is now the standing joint committee of the quarter sessions and the county council. The clerk to the justices is entitled to administer the oath and to recover the fee. The clerk has, at common law, the right to take fees, and the Table of Fees mentions the fee the plaintiff claims. The list of fees on the 1st page is not limited to matters which justices can only perform in special or petty sessions—e.g., it includes 1*s.* for the issue of a summons, and a justice of the peace is not bound to sit in petty sessions in order to grant a summons. Nor is the list of fees on the 2nd page of the Table of Fees exclusive. The fees sued for are Court fees within the meaning of s. 8 of the Justices' Clerks Act, 1877. A clerk to justices is entitled to charge a fee to any person for any services he is called upon to perform. The person who wishes the thing to be done must pay the fee: *Reg.* v. *Coles.* (1) Clerks of the peace and clerks to the justices are now payable by salary. It is true that *Boulter* v. *Kent Justices* (2) shews that

(1) (1845) 8 Q. B. 75. (2) [1897] A. C. 556.

justices sitting at an annual general licensing meeting do not constitute a Court of summary jurisdiction. But even though the justices were not sitting as a Court, it is sufficient that the plaintiff was acting as clerk to the justices. *Boulter* v. *Kent Justices* (1) was commented on in *Rex* v. *Woodhouse*. (2) In that case it was held that certiorari would lie to the licensing justices. Whether the evidence shall be taken on oath or not is a matter within the discretion of the justices. If the objector wishes to obtain the advantage of a statement on oath, he must pay for it: *Reg.* v. *Sharman, Ex parte Denton*. (3) There is nothing in the Alehouse Act, 1828, forbidding the clerk to the justices taking a fee from a person opposing a licence. The prohibition is limited to the receipt of any larger fees than those mentioned in the Act for the particular matters specified. The object of s. 15 of the Act of 1828 is to prevent the clerk to the justices extorting or secretly obtaining fees from an applicant for a licence. In 1828 it was not contemplated that witnesses would be called and sworn on the application for a licence.

J. A. Simon, for the defendant. The fees claimed by the plaintiff are not included in the Table of Fees of April 7, 1902, but even if they were their inclusion would not be valid, inasmuch as the Legislature has given no power to include them: *Reg.* v. *Coles* (4); *Kruse* v. *Johnson*. (5) In order that a fee may be lawful, it must be a Court fee within the meaning of s. 8 of the Justices' Clerks Act, 1877. These fees are not charges which may by law be demanded. Further, a general annual licensing meeting is not a Court; therefore the clerk is not acting as clerk to the justices. In order that a fee may "by law be demanded," it must be legally justified independently of the definition of "Court fee" contained in s. 8 of the Justices' Clerks Act, 1877. There is no statutory right to charge at an annual general licensing meeting the fees claimed. Nor is there any right at common law. No promise can be inferred from the request to be sworn. Where a public officer is appointed to perform a public duty, no implied promise to pay him arises from a request to him to perform his

(1) [1897] A. C. 556.
(2) [1906] 2 K. B. 501.
(3) [1898] 1 Q. B. 578.
(4) 8 Q. B. 75.
(5) [1898] 2 Q. B. 91.

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duty: *In re Howe.* (1) The ground of the decision in *Reg.* v. *Coles* (2) was that statutory power was given to the justices to regulate certain classes of fees. The claim was not one at common law. *Fleetwood* v. *Finch* (3) shews that there is no right at common law to make the claim which is advanced in the present case. There must be some statutory right to claim the fees unless they are due by virtue of an ancient office with the ancient common law right annexed to it to claim the fees: *Reg.* v. *Baker.* (4) Before 1828 justices had nothing to do with the granting of licences except possibly that they took recognizances. In 1828 Parliament, by the Alehouse Act, 1828, imposed the duty of granting licences upon a new body, and by s. 15 of the Act the clerk to the justices was made the clerk to the new body. Sect. 15 of the Act of 1828 is exclusive. It provides that certain fees shall be paid by the applicant for a licence, and that no other fees shall be paid by anybody. At the time the statute of 1828 was passed it was contemplated that if a person applied for a licence it would be granted to him as a matter of course. A licence to sell intoxicating liquor was in the same category as a licence to get married or to keep a dog. Whenever extended jurisdiction has been granted to justices by statute the Legislature has always specifically granted new fees if it intended them to be payable: for example, the fees allowed by s. 4, sub-s. 3, of the Licensing Act, 1870 (33 & 34 Vict. c. 29), and the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 10. Not only is there no licensing statute which provides for the fees claimed in the present case, but they are excluded by implication by s. 15 of the Alehouse Act, 1828. The oaths mentioned on the 1st page of the Table of Fees are those taken before justices when exercising their original statutory jurisdiction in petty sessions. In licensing matters the justices when sitting constitute a tribunal which has a code of its own. That code is contained in the licensing statutes, and the fees therein provided for can alone be claimed.

[The Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 74, definition of "Clerk of the licensing justices," was also referred to.]

Garland, in reply. Before 1828 justices had control of licences,

(1) (1887) 18 Q. B. D. 573.
(2) 8 Q. B. 75.
(3) (1793) 2 H. Bl. 220.
(4) (1837) 7 A. & E. 502.

and probably authority to grant them: Webb on English Local Government, p. 586. The preamble to the Alehouse Act, 1828, shews that the justices at the general annual licensing meeting are sitting in special sessions. It follows that the justices' clerk would sit with them at the special sessions. *Fleetwood* v. *Finch* (1) and *Reg.* v. *Baker* (2) are distinguishable. The words "Every oath . . . . not otherwise charged" on the 1st page of the Table of Fees cover the case of an objector. Even assuming the fees were originally wrongfully charged, as they have now statutory authority they can be recovered. Wherever the Legislature has intended that the fees it has prescribed should be exhaustive, it has said so in express terms. Examples of this are contained in the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 110, and the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 246.

[The Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13, sub-s. 11, was also referred to.]

RIDLEY J. In this case I have had some difficulty in arriving at a conclusion upon the question as to whether the decision of the county court judge can be supported. Sect. 15 of the Alehouse Act, 1828, on which he based his decision, is not in all respects an easy one to construe. Upon the whole, however, I have come to the conclusion that the section is intended to be exclusive, and that the fees therein mentioned, and no others, can be levied from persons who make an application for a licence under the Alehouse Act, 1828, or Acts in pari materia

In my opinion the contention on behalf of the defendant that the clerk when performing his duties at a general annual licensing meeting is not acting as the clerk to the justices as such is not sound. I think he falls within the provision contained in s. 8 of the Justices' Clerks Act, 1877, which defines the meaning of the expression "Court fee." It is true that the decision in *Boulter* v. *Kent Justices* (3) (which we, of course, fully accept) shews that the justices, with their clerk as their officer, became the new authority having the right of granting or refusing

(1) 2 H. Bl. 220. (2) 7 A. & E. 502.
(3) [1897] A. C. 556.

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licences at the general annual licensing meeting which was to be held by them in accordance with the Alehouse Act, 1828. But I do not think that the statute created a new statutory officer to do statutory work. In my opinion an old officer—an officer, I mean, who had existed in years gone by—had new duties assigned to him. If there had been at the time the new duties were assigned to him a schedule of fees enacted by and clothed with the authority of Parliament in a statute which then existed relating to such matters, and a new duty had been placed upon him coming within the class for which he was entitled to charge a fee, I think he would be entitled to make the charge in respect of the new duty: so that if he had been entitled to charge a fee in all cases brought before the justices for an oath administered to a witness, and a fresh statute had been passed placing upon that same body of justices new duties of a similar character, then the right of their clerk to charge the fee of 1*s.* for the oath administered to each witness would apply to the new duties as well as to the old. I am of opinion that the plaintiff was the clerk to the justices as such and was acting in that capacity, and if that were the only question he would be entitled to the fee he claims.

With regard to the question as to the common law right of clerks to the justices to receive fees, I do not think it is necessary to decide that point. I am of opinion, as far as my knowledge goes, that they had at common law a right which was recognized to receive certain fees. There is evidence that it was competent for a clerk to justices to demand the fee of 1*s.* mentioned in the Table of Fees for administering an oath. The Legislature in former times appears to have been accustomed to deal with these matters by enacting that the fees should not be more than a certain amount; and, looking just now at the ancient work entitled "Eirenarcha" (2), I was able to turn up the page in which I discovered two or three old Acts of Parliament, which were referred to, of the time of the Tudors, in which the clerks to the justices were interfered with and told that they

(2) Eirenarcha, or of the office of the Justices of Peace, in foure Bookes: Revised, corrected, and enlarged . . First collected by William Lambard of Lincolnes Inne Gent. Lond. 1610. See at p. 436.

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were not to demand more than a particular sum. It is not necessary, however, for us to deal with that point. For the purposes of this case I assume that the clerks to the justices have the right at common law to ask for the fee. But the question before us is whether the right exists in this case. In any point of view there are difficulties. The question is whether s. 15 of the Alehouse Act, 1828, is exclusive. If it is not exclusive, and the applicant is to pay 7*s.* 6*d.* for all the duties mentioned in the section, but all other fees are still to be payable by him which any other litigant, applicant, or person coming within the jurisdiction of the justices would have to pay, he would have to pay the fee of 1*s.* for being allowed to take the oath. But it appears to me that the section says, in language which is imperative, that the applicant to whom the licence shall be granted is not to pay anything more than 7*s.* 6*d.* The section prohibits any more being demanded or received. The words at the end of the section are possibly capable of being construed in a wider sense than those at the beginning of the section, which state precisely that it shall be lawful for the clerk to the justices to demand and receive from every person to whom a licence is granted certain fees and no more. The concluding words of the section are to the effect that any clerk who demands or receives from any person "for such respective fees in this behalf" any more than the fees specified in the section is to be convicted and fined. But the operative words with which we are dealing are: "It shall be lawful for the clerk to the justices . . . . to demand and receive from every person to whom a licence shall be granted . . . . the sums following and no more." I cannot think that we should be acting in accordance with the section if we were to hold that an applicant to whom a licence is granted had to pay, in addition to the sum of 7*s.* 6*d.*, a common law or customary fee. A decision that a common law fee would still remain payable by him would be, I think, contrary to the express provision of the first part of the section.

If the true view of s. 15 of the Alehouse Act, 1828, is that it is intended to be exclusive of all other legislation—that it relates to a subject outside other statutes and deals with justices of the

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peace, not as constituting a Court of petty sessions, but as a body of persons who have the duty imposed upon them of granting or refusing licences—considerable support is given to the contention on behalf of the defendant that clerks to the justices in such case have no right to fees payable by common law because that law does not apply to witnesses called on such proceedings. The right to fees of the same nature payable in respect of other proceedings would be untouched, but it would not apply in the present case. I do not see any great difficulty in following that contention, although it involves the proposition that the opponent of a licence is freed from any fees other than those mentioned in s. 15 of the Act of 1828 as well as the applicant. Having regard to the view the House of Lords took of the status of licensing justices in *Boulter* v. *Kent Justices* (1), our decision ought, I think, to be in favour of the defendant, upon the ground that the protection from fees that may be payable by common law given by s. 15 of the Act of 1828 is exclusive, and does not extend to proceedings before Courts in which there are parties—the applicant and the opponent—but treats the justices as a body of persons whose duty it is to entertain an application and to grant or refuse it. To a great extent the licensing statutes and the proceedings taken thereunder are not within the ordinary scope of the legislation affecting justices of the peace. I am therefore of opinion that the Table of Fees does not include the oath in respect of which the claim is made in the present case. I am of opinion that the Table of Fees, which is duly authorized and has the sanction of a Secretary of State, is prima facie valid; but it ought not to be assumed that an oath taken in proceedings such as these, which are not before justices exercising their ordinary jurisdiction, but being specially constituted to entertain these applications, falls within the Table of Fees. In my opinion it does not. It is perfectly conceivable that the draftsman of the Table of Fees had not the point in his mind, and it appears that for fifteen years these fees have not been asked for by the clerk to the justices.

For these reasons I have come, though not without some

(1) [1897] A. C. 556.

difficulty, to the conclusion that the decision of the county court judge ought to be affirmed.

BRAY J. I am of the same opinion. This is a claim by the clerk to the justices to be paid a fee of 1*s.* by a member of the public who has appeared in objection to an application for the granting of a licence and has been sworn. The position of such a person is shewn by the judgment of Lord Herschell in *Boulter* v. *Kent Justices* (1), where he says: "The question is not one inter partes at all. The justices have an absolute discretion to determine, in the interests of the public, whether a licence ought to be granted, and every member of the public may object to the grant on public grounds, apart from any individual right or interest of his own. The applicant seeks a privilege. A member of the public who objects merely informs the mind of the Court to enable it rightly to exercise its discretion whether to grant that privilege or not." I am not surprised to find that no member of the public who has been sworn upon these applications has been made to pay the fee now claimed, at all events to this clerk to the justices, for fifteen years at least, and I think it requires a strong case to shew that such a member of the public so appearing and being sworn is liable to pay the 1*s.*

The plaintiff relies upon s. 8 of the Justices' Clerks Act, 1877. Upon his behalf it is contended that the fee he claims is included in the Table of Fees and is therefore payable. Now the Table of Fees includes Court fees, and by s. 8 of the Act of 1877 it is provided that the expression "Court fee" "means any fee, gratuity or sum which may by law be demanded or received in respect of any business or act transacted or done by a clerk of special or petty sessions or a clerk of justices of the peace as such clerk." I decline to express any opinion as to whether the clerk to the justices was acting "as such"; but it is necessary that the fee should be a sum which may by law be demanded or received, and I have the greatest difficulty in seeing that there is any contract or liability, apart from statute, upon a member of the public who so appears and is sworn, to pay this 1*s.* Therefore, even if the fee were included in the Table of Fees, I should

(1) [1897] A. C. 556.

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doubt very much indeed whether it was properly there. But in my opinion s. 15 of the Alehouse Act, 1828, prescribes the only fees that are payable to the clerk to the justices on such a proceeding as this. It is quite true that the section does not contain any reference to the right of the clerk to the justices to receive fees from any person other than the applicant to whom a licence is granted, but nevertheless it was in my opinion intended to be exhaustive. I do not think he would be entitled to receive anything from an applicant who failed in his application, nor do I think that if he succeeded in the application and had to pay the fee of 7*s.* 6*d.* he would have to pay in addition the fee of 1*s.* for the oath. In my opinion the words of s. 15 of the Alehouse Act, 1828, clearly mean that the clerk to the justices shall receive for the whole of his trouble and expenses connected with the application, where it is successful, the sum of 7*s.* 6*d.* and no more. I think that that sum would include the whole of the expenses of the hearing or proceeding; so that it is quite sufficient to say that s. 15 of the Act of 1828 is exhaustive. What may be called, for convenience, a new tribunal was being established. It is not a Court—it was a new tribunal; and the fees which the clerk to the justices was to receive in respect of these matters were prescribed and fixed. In my opinion the Table of Fees not only corroborates that view of s. 15 of the Act of 1828, but the Table does not, and is not intended to, cover an expense of the nature of the fee claimed by the plaintiff. The words "Hearing—When no conviction or order is made" do not apply, because no conviction or order is asked for. Nor does the fee come under the head "Licence.—For every occasional licence." An occasional licence is one of an entirely different character which is granted at special sessions. The head "For every licence, consent or authority not otherwise provided for, to include registration when necessary, 2*s.* 6*d.*," cannot cover the granting of a new licence, because in that case 7*s.* 6*d.* is to be payable, not 2*s.* 6*d.* As to the expression "List," there is no list involved in the present case. Nor can the words "Every notice" apply, for there is no notice prescribed in the Act of 1828 except the general notices of the annual licensing meeting, which, of course, are not intended to be paid for by every

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applicant, and the notice which the applicant himself has to give at his own cost. The head "Oath.—Every oath, affirmation, or solemn declaration not otherwise charged, 1*s.*," is not, in my opinion, intended to cover the case of an oath before an annual licensing meeting. That is strongly borne out by the 2nd page of the Table of Fees, which has the heading "Licences," and deals with every one of the statutory charges.

In my opinion the plaintiff fails for two reasons: first he is excluded from making any further charge by s. 15 of the Alehouse Act, 1828; secondly, the fee he claims is not included in the Table of Fees.

Appeal dismissed.

Solicitors for plaintiff: *Maude & Tunnicliffe, for G. I. Simey, Bath.*

Solicitors for defendant: *Church, Adams & Prior.*

J. E. A.

In re A SOLICITOR. *Ex parte* HALES.

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May 29.

Solicitor—Undertaking to pay Money to Person not Client—Disciplinary Jurisdiction of Court—Summary Order for Payment.

Where a solicitor in the course of legal proceedings makes a statement to a person even though not his client, that funds have been put into his hands for the purpose of payment to that person upon a certain event happening, and that upon the happening of the event he will pay the money, the personal undertaking of the solicitor is sufficient to enable the Court to exercise its summary jurisdiction to compel him to carry out the undertaking on the application of the person to whom it is given, although it is not a personal guarantee in the sense that the solicitor guarantees the payment of the money out of his (the solicitor's) own pocket.

Further, the Court will exercise its disciplinary jurisdiction to prevent a breach of trust where there has been a declaration of trust by a solicitor in favour of a person even though not his client, which induces that person to alter his position.

APPEAL from an order made by Bray J. setting aside the order of Master Day directing the respondent to pay over to the appellant the sum of 82*l.* 10*s.* 7*d.*

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The appellant Hales had acted as solicitor for one Fournet. In November, 1905, Fournet instructed the respondent, a solicitor, who practised under the name of a firm, to tax two bills of costs delivered to him by the appellant. The respondent accordingly took out a summons on behalf of Fournet to refer the bills to taxation. On the hearing of the summons the appellant informed the Master that Fournet was an undischarged bankrupt, and that the application to tax was vexatious, as Fournet had no intention of paying the costs. The respondent's clerk denied that Fournet was an undischarged bankrupt, and the Master made the order to tax. Fournet was, in fact, an undischarged bankrupt, and the respondent informed Fournet of what had taken place before the taxing Master. Fournet thereupon placed 159*l.* 6*s.* 9*d.* in the respondent's hands and instructed him to inform the appellant thereof. The respondent accordingly, on December 11, 1905, sent the following letter to the appellant: "Having regard to the statements made by your clerk to the Master on our client's application to tax your bills of costs, Mr. Fournet has to-day placed in our hands the full amount of your bills, so that on the completion of the taxation we shall be in a position to pay you the amount certified by the Master due to you."

On the faith of the letter the appellant did not take steps to enforce the prompt and due carriage of the order for taxation, and did not take proceedings against Fournet as he would otherwise have done. The taxing Master, by his certificate dated December 7, 1906, certified that there was a balance of 82*l.* 10*s.* 7*d.* due to the appellant. The respondent did not pay the 82*l.* 10*s.* 7*d.* or any part thereof to the appellant, but claimed that he had from time to time, out of the money placed by Fournet in his hands, paid various sums of money on behalf of Fournet, and had rendered services to him. He said that the money so paid by him (the respondent) and the costs Fournet had incurred to him resulted in no money belonging to Fournet being in the respondent's hands.

On January 3, 1907, Fournet died, and on the same day the appellant took out a summons before Master Day, asking that the respondent might be ordered, in pursuance of his letter of

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undertaking dated December 11, 1905, to pay to the appellant 82*l.* 10*s.* 7*d.*, the amount of the taxed costs certified by the taxing Master. Master Day made the order asked for on the summons, but Bray J. reversed the decision of Master Day. The present appeal was brought from the order of Bray J., and by his notice of appeal the appellant asked that the order of Bray J. might be rescinded and that the respondent might be ordered to make payment to the appellant of the sum of 82*l.* 10*s.* 7*d.* in accordance with the respondent's letter to the appellant of December 11, 1905, on the ground that the respondent, as a solicitor and officer of the Court, had engaged by the letter to do so, and was under a professional duty to pay over to the appellant the said sum, the same having been deposited for that purpose.

Gore-Browne, K.C., and *J. H. Watts*, for the appellant. The facts shew that a sum of money was placed in the solicitor's hands for the purpose of meeting a particular claim. That was communicated to the appellant and influenced his conduct. The taxation was not pressed on as it otherwise would have been. Fournet never revoked his authority. If a solicitor appropriates a sum of money in payment of his own costs when he has given an undertaking to pay it to a third person, the Court will enforce the payment to the third person which the solicitor has undertaken to make. The letter of December 11, 1905, is in effect a guarantee that the respondent will pay the money. This Court will enforce honourable conduct on the part of solicitors as well as the discharge by them of strictly legal liabilities: *In re Freston* (1); *In re Grey* (2); The Annual Practice (1907), vol. 2, p. 407. The principle applies although the duty is not to the solicitor's own client: *Schmitten* v. *Faulks*. (3) The letter of December 11, 1905, amounts to an equitable assignment. A person who receives such a letter from a solicitor is right in invoking the disciplinary jurisdiction of the Court where there is a breach on the part of the solicitor of the duty he has undertaken to perform: *In re Pass*. (4) The letter also

(1) (1883) 11 Q. B. D. 545.
(2) [1892] 2 Q. B. 440.
(3) [1893] W. N. 64.
(4) (1887) 35 W. R. 410.

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constituted a declaration of trust of the money. It is therefore a breach of trust not to pay it over.

Montague Shearman, K.C., and *Horace Douglas*, for the respondent. The question is whether the letter of December 11, 1905, was a personal undertaking by the respondent to pay the client Fournet's debt. The letter is merely an intimation as to what the client has done. *In re Grey* (1) does not apply unless there is a personal undertaking on the part of the solicitor to pay. The summary procedure of the Court is not applicable unless the solicitor has given a personal undertaking to the Court or is under an obligation to his own client. In the present case the respondent gave the undertaking to the appellant on behalf of his client, and not as a personal undertaking. He is not liable to the summary jurisdiction of the Court on a mere statement to a third person that his client has deposited money with him and that he believes it will be in his hands when the taxation is completed: *Allaway* v. *Duncan*. (2) The undertaking was given on behalf of the client Fournet, and the remedy of the appellant is against him only. The summary jurisdiction of the Court cannot be invoked by a person not a client where he has an equitable remedy against the solicitor, as the appellant has if the letter of December 11, 1905, amounts to a declaration of trust. There is no general jurisdiction in the Court to enforce honourable conduct on the part of a solicitor at the suit of a third person.

DARLING J. I am of opinion that this appeal must be allowed. It appears that the appellant had a claim against Fournet for work done as his solicitor. Fournet was an undischarged bankrupt. He desired to tax the appellant's bill of costs. To this the appellant objected, on the ground that Fournet was an undischarged bankrupt and had no intention to pay the costs. Upon that objection being made, Fournet said in effect, "True I am an undischarged bankrupt, but I have money, and I will put it in the hands of my solicitors in order that you may be safe." He did pay money more than sufficient to pay the bill into the hands of the respondent, who then wrote the letter of

(1) [1892] 2 Q. B. 440. (2) (1867) 16 L. T. 264.

December 11, 1905, to the appellant. In my opinion the letter contained a definite statement by the respondent that on the completion of the taxation he would be in a position to pay the money. That statement means that the money will still remain in the respondent's hands allocated to the payment of the taxed costs. I think it is important to notice that the word used is "shall," and not "should." I understand the word "shall" to mean that "In consequence of what Fournet has done, we shall, on the completion of the taxation, be in a position to pay the money due to you." That is another way of saying, "In consequence of what Fournet has done, on the completion of the taxation the money will still remain in our hands for the purpose of being paid to you." On the faith of the undertaking contained in that letter, the appellant did not take steps to enforce the prompt and due carriage of the order for taxation, and did not take proceedings against Fournet as he would otherwise have done. Fournet died on the day that the summons with which we have to deal was issued. The respondent now declines to pay over the money necessary to discharge Fournet's debt to the appellant, upon the ground that he the respondent is making a claim against Fournet's estate and that he intends to hold this money in order to pay himself. The appellant has taken out this summons invoking the jurisdiction of this Court over one of its own officers. On behalf of the respondent Mr. Shearman admitted that the Court might make the order asked for by the notice of appeal in certain circumstances, but contended that the letter is merely an undertaking given by the respondent on behalf of his client, and is not a personal guarantee by him, and that therefore the Court will not make the order asked for. I do not think the letter is a personal guarantee in the sense that the respondent personally guarantees the payment of Fournet's debt out of his (the respondent's) own money, so that he would be out of pocket by paying the appellant. But in my opinion it is a personal guarantee in the sense that it is a statement that, Fournet having put funds into the respondent's hands for the purpose of paying the appellant upon a certain event happening, upon the happening of that event he (the respondent) will pay

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the money. His position is very much that of a stakeholder. I am of opinion that a personal undertaking in that sense is quite sufficient to enable us to exercise the jurisdiction of the Court. Let us see whether the case comes within the rules laid down as to the circumstances in which the jurisdiction will be exercised. I prefer to take the definition given by Bowen L.J. in *In re Grey.* (1) The statement he there makes is very accurate, and I think it is wide enough to cover this case. He says: "The solicitor in this case is in a situation which presents two aspects, involving a double responsibility. He was a debtor, who owed a legal debt. He also owed a duty to his profession, and to the Court of justice whose officer he was, to pay over the money which belonged to his client, and of which he had possession through the confidence placed in him in his professional capacity, and as an officer of the Court. There are in such a case two wholly distinct rights, the right of the client at law to be paid his debt, and his right to apply to the Court as a person whose confidence has been abused by a person who is an officer of the Court, and whom he would not have trusted unless he had been such an officer."

It is perfectly clear that where there is no remedy by action for debt there may be this remedy, because Bowen L.J. says there are two wholly distinct rights. In the present case the appellant would not have trusted Fournet if he (Fournet) had written a letter and said, "I have money enough to pay your bill"; nor would he have altered his position on the respondent's assurance that Fournet had money enough to pay the bill. He has altered his position, and thus brought himself within the rule under which he is entitled to invoke the disciplinary jurisdiction of the Court because his confidence has been abused by an officer of the Court. He trusted the respondent where he would not have trusted Fournet, because the respondent said in effect, "I have enough money to meet your bill, and it has been given to me so that on the completion of the taxation I shall be in a position to pay you the amount certified due to you by the Master." It seems to me that where a solicitor still has money in his possession confided to him by his client for a particular

(1) [1892] 2 Q. B. 440.

purpose to be paid over on the happening of circumstances which have since happened, it would be dishonourable for that officer of the Court to retain the money, and doubtless do that which he desires, namely, pay himself the sum which he claims against the client. It was laid down by Lord Esher M.R. in *In re Grey* (1) that the jurisdiction which is now invoked exists for the purpose of "enforcing honourable conduct on the part of the Court's own officers." Although there may be no case in which it has been said that the Court will use this power to prevent the commission of a breach of trust, in my opinion, the Court ought to and will make use of it if there is a declaration of trust. In my opinion the letter of December 11, 1905, constitutes a declaration of trust whether it is a guarantee or not. I think it was a declaration of trust by the respondent which led the appellant to alter his position; and, that being so, I think that the appellant, although not a client of the respondent's, has the right to come to this Court and ask us to prevent this dishonourable conduct on the part of a solicitor, that dishonourable conduct being the commission of a breach of trust against the appellant, who has altered his legal rights in consequence of the declaration of trust. For these reasons I think the appeal must be allowed.

A. T. LAWRENCE J. I am of the same opinion. I quite agree with Mr. Shearman's contention on behalf of the respondent that mere dishonourable conduct does not give the Court jurisdiction to apply this summary remedy. The dishonourable conduct in such cases in order to give the Court jurisdiction must be dishonourable conduct to the applicant in the course of legal proceedings, and if the applicant can shew that there has been dishonourable conduct to him, prejudicing his position, it is then that he can come to the Court and say, "I ask for the interposition of the Court by way of this summary remedy." What was the position in this case? The client was an undischarged bankrupt. He owed a bill of costs to his late solicitor, and he wanted to have that bill taxed, as he had a right to do. The solicitor, when the matter came before the Master, said that it was a mere vexatious proceeding

(1) [1892] 2 Q. B. 440.

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by an undischarged bankrupt to put him to the costs of a long taxation, and when it was completed he would get nothing. I can easily imagine, upon that being stated to the Master, the clerk on the other side saying, "This is not a vexatious proceeding and the client is not an undischarged bankrupt, and the bill will be duly paid." The Master accordingly made the order for taxation. When the clerk goes back the respondent, on being informed of what had taken place, communicated with Fournet, who was really an undischarged bankrupt. That fact placed the respondent in an awkward position, because he might be proceeding with a matter which might be extremely vexatious to the appellant.

Fournet, upon being informed of the position matters were in, replied, "I have the money, and I will hand it over to you now"; and he did so. The respondent thereupon wrote the letter of December 11, 1905. What does that letter mean? It means, "I am holding this sum of money to furnish the amount of your costs. I am not proceeding vexatiously, but bona fide to tax the bill of costs, and when the amount is due we" (i.e., the respondent) "shall be in a position to pay you the amount certified due to you by the Master." How can litigation or legal proceedings be conducted justly or honourably if a statement of that sort is not to be taken as true? I think that the statement in the letter was not a personal undertaking in the sense that the respondent undertook to pay the money out of his own pocket, but was personal in the sense that he said "we" (i.e., the respondent writing in the name of the firm under which he practised) "have this fund, which we have appropriated to this purpose, and from which we will pay you any amount to which you establish your right." That was the position between the parties created by the letter. The taxation proceeds on this footing, and a sum of 82*l.* 10*s.* 7*d.* is found to be due to the appellant. In the meanwhile, a long time having been allowed by the appellant to elapse on the faith of that letter, the respondent says, "The position between myself and my client Fournet has altered. Costs are owing to me from him, and therefore I propose to appropriate this sum to my own purposes." I am of opinion that that is one of the cases in which the Court ought to interpose and say, "No;

if you write letters of this kind and make these statements which are acted upon by other persons you cannot afterwards turn round and appropriate the money merely because your own position has changed." That would be, in the sense in which the Court uses the term, dishonourable conduct. I do not say that the respondent does not think that he has the right to protect his own interests, but I am of opinion that he is not right in so thinking. I quite agree that in *In re Grey* (1) the Court was dealing with a case arising between a solicitor and his client, and in that respect no doubt Mr. Shearman was right on behalf of the respondent in drawing the distinction between that case and this, and is right perhaps in saying that this letter was not a personal guarantee. But it is a personal undertaking to apply that fund to a particular purpose, and I think, therefore, that the respondent is bound to pay over this money.

Appeal allowed.

Solicitor for appellant: *W. H. Hales.*
Solicitors for respondent: *Richardson & Co.*

(1) [1892] 2 Q. B. 440.

J. E. A.

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April 11, 12; May 15.

CRIBB *v.* KYNOCH, LIMITED.

Master and Servant—Dangerous Employment—Infant—Duty to Instruct—Delegation of Duty—Foreman—Negligence—Common Employment—Liability of Master.

The plaintiff, a girl fifteen years old, was employed in the defendants' cartridge factory in the work of testing the gauge of loaded cartridges. She worked under a forewoman, whose duty it was to give her proper instructions and warning as to the dangerous nature of the work, and in consequence of the forewoman's negligent failure to do so the plaintiff caused a cartridge to explode, thereby sustaining personal injuries, in respect of which she sued the defendants:—

Held, that the doctrine of common employment applied and the defendants were not liable, because, although there is a duty on an employer to give instructions to a young or inexperienced person employed by him in dangerous work, that duty is one which may be delegated by him to a foreman, and the negligence of the foreman is a risk which a fellow-servant, even though an infant, takes upon himself.

Appeal of defendants from a decision of the judge of the county court of Essex.

The facts were stated as follows in the judgment of the Divisional Court:—"This is an appeal from a decision of his Honour Judge Tindal Atkinson in an action brought by Mercy Cribb, a girl of fifteen years of age, against her employers, Messrs. Kynoch, Limited, for damages for personal injuries caused, as she alleged, by the negligence of the defendants. The action was based solely on the common law liability of the defendants, and was tried before the learned judge alone without a jury, and he gave judgment for the plaintiff with 300*l.* damages. The facts, as found by the learned judge, were as follows: The defendants are manufacturers of explosives and cartridges, and have a factory at Kynochtown, in Essex, where, amongst other work, they load cartridges. The plaintiff was engaged by the defendants' manager, and entered their service on February 17, and was employed in the first instance to weigh bullets, and was so occupied on February 17 and 18. On Monday, the 20th, she was told by one of the managers to go to the gauging shed. A Miss Julia Bass was the forewoman of this shed, and she explained to the plaintiff what she was to do

which was to test the gauge of loaded cartridges. In order to do this she had first to place the cartridge into a bore in a small block of iron, and then pass the block with the cartridge in it under a small bar supported by two upright bars fixed into a small base of iron secured to the table. If the cartridge passed under the bar her duty was to turn the cartridge out of the block, and the cartridge then fell into a basket. She was told by Miss Bass that if the cartridge jammed in the block and did not fall out she was to give it to the fitter. Miss Bass did not warn the plaintiff of the danger that might follow from striking the cap of the cartridge. Miss Bass watched the plaintiff do her work for some time, and, finding that she did it satisfactorily, left her. The plaintiff continued her work till 12.30, when she went away for her dinner, and returning at 1.30 resumed her work. At about 2 o'clock a cartridge became jammed in the block, and in order to get it out she tapped the block with the cartridge in it against the iron base, not in the way in which she had been instructed, and in so doing struck the cap against the corner of the iron base and caused the cartridge to explode. The explosion destroyed her right eye. On these facts the defendants contended (in addition to the denial of negligence)—(1) that the plaintiff disobeyed express instructions, and the accident was the direct result of this disobedience; (2.) that the injury was occasioned by the plaintiff's contributory negligence; (3.) that the negligence, if any, was the negligence of Miss Bass, and that the plaintiff and Miss Bass were engaged in a common employment. The learned judge decided in favour of the plaintiff on each of these contentions, found that Miss Bass had been guilty of negligence in not sufficiently warning the plaintiff of the danger, and awarded her 300*l.* as damages."

The defendants appealed.

Ruegg, K.C., and *C. E. Jones*, for the appellants. The county court judge found as a fact that there had been negligence on the part of Miss Bass, the forewoman, in that she did not sufficiently warn the respondent of the consequences of disregarding the instructions given to her, but he has wrongly held as a matter of law that the duty to give proper instructions to the respondent

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was one which lay on the appellants personally and which could not be delegated, and that the doctrine of common employment therefore did not apply to this case. The authorities shew that that is not a correct view of the law. The case of *O'Byrne* v. *Burn* (1), in which it was held that the employer was responsible to an inexperienced employee for the negligence of an overseer appointed to represent the employer, cannot now be regarded as authoritative. *O'Byrne* v. *Burn* (1) was decided at a time when there was a question as to whether the doctrine of common employment—which originated in England in *Priestley* v. *Fowler* (2)—was law in Scotland. That question was finally settled in the affirmative by the House of Lords in *Bartonshill Coal Co.* v. *Reid* (3), and the case of *O'Byrne* v. *Burn* (1) lost any authority which it had ever possessed after the decision of the House of Lords in *Wilson* v. *Merry* (4), where it was expressly laid down that, for the purpose of the doctrine of common employment, an employee, who is placed in a position of superintendence or authority over other employees, cannot be distinguished from any other fellow-servant. If a master does not personally execute the work connected with his business, his duty towards his employees who are inexperienced by reason of their youth or any other cause is to select proper and competent persons to superintend his business. If he does that, he is under no further obligation towards them. He does not guarantee that his foreman or superintendent will not be negligent. [*Johnson* v. *Lindsay* (5) was also referred to.]

[It was also contended that there was no evidence of any negligence on the part of Miss Bass.]

A. Powell, K.C., and *Minton-Senhouse* (*G. F. Emery* with them), for the respondent. The decision of the county court judge was right. The respondent, a girl of tender years, was employed at dangerous work, and it was the appellants' duty to see that she was properly instructed as to the dangers that might arise: *Crocker* v. *Banks* (6); *Robinson* v. *Smith* (7); *Sharp* v.

(1) (1854) 16 D. 1025.
(2) (1837) 3 M. & W. 1.
(3) (1858) 3 Macq. 266.
(4) (1868) L. R. 1 H. L. (Sc.) 326.
(5) [1891] A. C. 371.
(6) (1888) 4 Times L. R. 324.
(7) (1901) 17 Times L. R. 235, 423.

Pathhead Spinning Co. (1) That duty is one which, in the case of an employee of the respondent's age, cannot be delegated so as to relieve the employer from responsibility; in other words, if a foreman or other person entrusted with the duty of instructing the young employee is negligent the employer cannot escape liability. *O'Byrne* v. *Burn* (2) is a good authority on this point and has never been overruled, and the proposition is supported by Cockburn C.J.'s direction to the jury in *Grizzle* v. *Frost* (3), and by the observations of Lords Cranworth and Chelmsford in *Bartonshill Coal Co.* v. *Reid.* (4) *Hughes* v. *Percival* (5) shews that some duties cannot be got rid of even by employing a contractor. The foundation of the doctrine of common employment is that a person entering into employment does so with his eyes open and contemplates the risk of the negligence of a fellow-servant: *Howells* v. *Landore Steel Co.* (6); *Lovell* v. *Howell.* (7) It is a necessary corollary to this that there must be power on the part of the employee to contemplate that risk: *Johnson* v. *Lindsay* (8); but in the case of a person in the position of the respondent that power is obviously lacking, and, therefore, in a case like the present the doctrine of common employment has no application. The American case of *Railroad Co.* v. *Fort* (9) is a decision in favour of this view. [*Murphy* v. *Smith* (10) and *Farrant* v. *Barnes* (11) were also referred to.] *Wilson* v. *Merry* (12) is not an authority against the respondent's contention, for in that case the injured workman was not an inexperienced person of tender years, and the question raised by the present case was not under consideration. In any case, if the contract of employment is of the nature described in *Wilson* v. *Merry* (12), it clearly contains a term which is not for the benefit of an infant, and the employer cannot successfully plead it against an infant plaintiff. If he can do so, it would have been such an obvious and conclusive defence in *Robinson* v.

(1) (1885) 12 R. 574.
(2) 16 D. 1025.
(3) (1863) 3 F. & F. 622.
(4) 3 Macq. at pp. 295, 311.
(5) (1883) 8 App. Cas. 443.
(6) (1874) L. R. 10 Q. B. 62.
(7) (1876) 1 C. P. D. 161.
(8) [1891] A. C. 371.
(9) (1873) 17 Wallace, 553.
(10) (1865) 19 C. B. (N.S.) 361.
(11) (1862) 11 C. B. (N.S.) 553.
(12) L. R. 1 H. L. (Sc.) 326.

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Smith (1) that a new trial in that case would not have been ordered.

Ruegg, K.C., in reply. The doctrine of common employment does not rest upon the principle of volenti non fit injuria, but, as was pointed out by Lord Cairns in *Wilson* v. *Merry* (2), upon the fact that the master has not undertaken to be responsible for the negligence of his workmen. It cannot be assumed that the additional duty contended for by the plaintiff is undertaken where the employee is under age; and no reason can be suggested why the alleged duty should be limited to the case of child workers; the principle would apply equally in every case where the workman, whatever his age, is inexperienced or requires instruction in some particular work. It is not disputed that there is a duty on an employer to give adequate instructions when his workman is engaged on dangerous work, but the cases cited do not support the contention that that is a duty which the master cannot delegate to a competent foreman or superintendent. *Grizzle* v. *Frost* (3) was decided before *Wilson* v. *Merry* (2), and at a time when it was thought, erroneously, that a foreman was not a fellow-servant of the workmen whom he directed. In *Robinson* v. *Smith* (1) and *Crocker* v. *Banks* (4) the question of common employment was not raised.

Cur. adv. vult.

May 15. The judgment of the Court (Ridley and Bray JJ.) was read by

BRAY J., who, after stating the facts as set out above, continued as follows:—Before us the defendants, the appellants, raised two contentions—(1.) that there was no evidence of any negligence on the part of Miss Bass; (2.) that the learned judge was wrong in law in holding as he did that the doctrine of common employment did not apply. The first point appears to us to present no difficulty. We think it is established by the two cases cited by the learned judge—*Crocker* v. *Banks* (4) and *Sharp* v. *Pathhead Spinning Co.* (5)—that, on setting an inexperienced girl to work at

(1) 17 Times L. R. 235, 423.
(2) L. R. 1 H. L. (Sc.) 326.
(3) 3 F. & F. 622.
(4) 4 Times L. R. 324.
(5) 12 R. 574.

a dangerous machine or to deal with dangerous articles, the girl should be warned of the dangers likely to arise. Loaded cartridges are obviously dangerous articles, and danger is likely to arise if the cap be struck, and we think there was ample evidence that Miss Bass, whose duty it was to instruct the plaintiff in her work, was guilty of negligence in omitting to warn the plaintiff of this danger, and that it was the omission to warn the plaintiff of this danger which was the cause of the accident.

We pass now to the second point, which was the one mainly argued by the counsel for the appellants. It is obviously a point of great and wide-reaching importance, and of some difficulty, and we thought it right to reserve our judgment in order that we might carefully examine the cases cited to us, and put our reasons into writing. The principle of law on which the learned county court judge has decided this case, to use his own carefully-selected words, is that it was a condition in the employment of the plaintiff that she should be informed of the risks she incurred in that employment, and the danger incident to a disregard of the instructions given her, and that the defendants could not delegate the obligation to perform that condition to another so as to avoid liability if there should be a breach of it. That this duty exists, and lies upon the master, if he is the person to give instructions, we do not doubt for a moment, and that not only towards children of tender age, but towards all his servants who may be otherwise ignorant of the risks. Nor do we doubt that it is the duty of the master to exercise due care in providing servants competent to give these instructions; but the difficulty arises in respect of the latter part of the proposition, that it was a duty that the master could not delegate to another so as to avoid liability if there should be a breach of it.

The authority quoted by the learned judge in support of his judgment was the case of *O'Byrne* v. *Burn*. (1) There is no doubt that the facts in that case are very similar to the facts in this case, and it must be carefully examined. It was decided in the year 1854, at a time when the Scotch judges were disposed to doubt whether the doctrine of common employment was part of the law of Scotland. In *Johnson* v. *Lindsay* (2) Lord

(1) 16 D. 1025. (2) [1891] A. C. 371, at p. 385.

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Watson says: "Down to the date of the judgment of this House in the *Bartonshill Cases* (1) the Court of Session declined to accept the doctrine of collaborateur as part of the law of Scotland, and held the liability of a master for his servant's fault to be the same in the case of a fellow-servant as of a stranger. After the doctrine was authoritatively declared to be Scotch law, the Court of Session for some time construed the word 'collaborateur' in its strictest sense, as signifying a fellow-servant who laboured with his hands." This consideration alone should, in our opinion, make us hesitate to act on the authority of that case; but it was referred to by Lord Cranworth in his judgment in the case of *Bartonshill Coal Co.* v. *Reid.* (2) His Lordship, after referring to the facts of the case, says: "This might have been quite right. It may be that if a master employs inexperienced workmen, and directs them to act under the superintendence, and to obey the orders, of a deputy whom he puts in his place, they are not, within the meaning of the rule in question, employed in a common work with the superintendent. They are acting in obedience to the express commands of their employer, and if he by the carelessness of his deputy exposes them to improper risks, it may be that he is liable for the consequences." It will be seen that his Lordship hardly expresses an opinion, but merely suggests a possible distinction between the former decision and the case then under consideration; but, assuming it to be his opinion, it is based on the fact that the superintendent or deputy is not acting as a fellow-workman, but rather as an agent or representative of the master. Upon this, we have to make two observations: First, that this statement of the law is not consistent with the law as subsequently laid down in the House of Lords in *Wilson* v. *Merry* (3), a case that we shall presently deal with; and, secondly, that it does not go the full length of the proposition laid down by the learned judge, which is that it was a condition of the employment that the servant should be informed of the risk, and that the duty to inform could not be delegated. The case of *O'Byrne* v. *Burn* (4) was also referred to by Lord Chelmsford in the *Bartonshill Coal*

(1) 3 Macq. 266.
(2) 3 Macq. at p. 295.
(3) L. R. 1 H. L. (Sc.) 326.
(4) 16 D. 1025.

Co. v. *Reid* (1), where his Lordship, then Lord Chancellor, says: "In *O'Byrne* v. *Burn* (2) it was hardly possible to apply the principle of the servant having undertaken the service with a knowledge of the risks incident to it. She was an inexperienced girl employed in a hazardous manufactory, placed under the control, and it may be added the protection, of an overseer, who was appointed by the defender and entrusted with this duty. And it might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed." This statement of the law approaches more nearly to the proposition laid down by the learned county court judge; but, again, it is only stated as a possible explanation of the case of *O'Byrne* v. *Burn* (2) distinguishing it from the case before their Lordships, and we shall have to consider how far it is consistent with the law as laid down eight years later in *Wilson* v. *Merry*. (3) The next case cited to us was *Grizzle* v. *Frost* (4), where the summing up of Cockburn C.J. to the jury at nisi prius is reported. It is difficult to gather from the very much condensed report of this summing up of the learned Chief Justice the exact proposition of law which he intended to lay down. It may be that he considered the foreman as put in the place of the master, and not acting as a fellow-servant; or it may be that he intended to state the law as it is stated by the learned county court judge. This, again, was five years before the decision in *Wilson* v. *Merry*. (3) In *Murphy* v. *Smith* (5) it was held that the defendant was not liable for the negligence of a man named Debor, as Debor could not be said to be the defendant's representative, but the facts are distinguishable from the present case, and we do not think it can be treated as an authority either in favour of or against the plaintiff in this case.

We now come to the case of *Wilson* v. *Merry*. (3) This was the case principally relied upon by the defendants. The plaintiff's son, Henry Wilson, was employed at a colliery worked by the defendants. In order to open an underlying seam called

(1) 3 Macq. 266, at p. 311.
(2) 16 D. 1025.
(3) L. R. 1 H. L. (Sc.) 326.
(4) 3 F. & F. 622.
(5) 19 C. B. (N.S.) 361.

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the Pyotshaw seam, a scaffold was erected in the pit, which interrupted the free circulation of air in the pit, and so caused an accumulation of firedamp, and Henry Wilson, who was freshly engaged two days after the erection of the scaffold to drive the level in the Pyotshaw seam, while searching on the scaffold with a light for a missing wedge, caused the light to come in contact with the firedamp, and an explosion took place by which he was killed. The defendants (the respondents) had taken no part in the erection of the platform, and no personal fault or negligence of any kind was imputed to them. The general manager of the works in Lanarkshire was Mr. Jack. Under him in the pit in question was John Neish. The charge of sinking the pit and making arrangements for working it was given to Neish, and it was not controverted that Jack and Neish were competent persons selected by the defendants with due care, and furnished with all necessary materials and resources for working in the best manner. The question raised in the House of Lords was whether the direction of Lord Ormidale, the presiding judge, to the jury was correct. The direction was in these words: "If they were satisfied on the evidence that the arrangement or system of ventilation in the Haughhead pit at the time of the accident in question had been designed and completed by Neish before the deceased Henry Wilson was engaged to work in the pit, and that the defenders had delegated to Neish their whole power, authority and duty in regard to that matter, and also in regard generally to all the underground operations without control or interference on their part, the deceased Henry Wilson and Neish did not stand in the relation of fellow-workmen engaged in the same common employment, and the defenders were not on that ground relieved from liability to the pursuer for the consequences of fault, if any there was, on the part of Neish in designing and completing said arrangement or system of ventilation." It was held by the House of Lords unanimously that this was a misdirection in two particulars—first, in saying that a liability was thrown on the defendants which would not otherwise have existed if the scaffold was finished before the deceased Henry Wilson was engaged; secondly, in asking the jury to consider whether the defendants had delegated to

Neish their whole power and authority and duty in regard to the system of ventilation, and generally in regard to all the underground operations without control or interference on their part. It will be seen that the main question to be considered was whether the master could delegate his obligation to take due care so as to avoid liability if there was a breach. It was held that he could, on the broad ground that the master could not be liable to the servant unless there was negligence on the part of the master in that in which he, the master, had contracted or undertaken with his servant to do. After stating the law in these words, Lord Cairns proceeds (1): "The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. . . . . As was said in the case of *Tarrant* v. *Webb* (2), negligence cannot exist if the master does his best to employ competent persons; he cannot warrant the competency of his servants." Lord Colonsay lays down the law in language practically to the same effect, except that he says there may be other duties (i.e., other than the duty to select competent persons, and to supply the means of providing proper machinery or materials) wherein if the master fails he may be responsible. Lords Cranworth and Chelmsford did not lay down the law with the same precision, but there is nothing in their judgments which conflicts with the rule of law laid down by Lord Cairns, that the master has not contracted with the servant to execute in person the work connected with his business, and that he does not

(1) L. R. 1 H. L. (Sc.) at p. 332. (2) (1856) 18 C. B. 797.

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warrant the competency of his servants. It seems to us that there is no trace to be found in these judgments of a doctrine that, in the particular matter of instructing and warning young or inexperienced persons in dangerous employment, the master does warrant the competency of his servants, and is liable if they fail to give the proper instruction and warning. The case has this further importance, that Neish, of whose negligence the deceased was held to have undertaken the risk, was not a collaborateur with him, but was in a superior position analogous to that of a foreman; and both Lord Cranworth and Lord Chelmsford said that in their opinion such a distinction could not in law be supported, although the contrary view had been held by Scotch judges of eminence. For, as was said by Willes J. in *Gallagher* v. *Piper* (1), a foreman is a servant as much as the other servants whose work he superintends.

The two cases of *Crocker* v. *Banks* (2) and *Robinson* v. *Smith* (3) were cited also on this point, but they do not seem to us to throw any light upon the question before us, because it is quite plain that the question of common employment was not argued, for what reason need not be considered. The proposition of law laid down in those cases is one which has been clearly established —namely, that it is the duty of the master to warn young and inexperienced persons of any danger that existed in relation to the work in which they are employed. Those cases throw no light on the question whether the duty can be delegated by the master so as to avoid liability in case of any breach of it. So in *Howells* v. *Landore Steel Co.* (4), decided in 1874, six years after *Wilson* v. *Merry* (5), the defendants were sought to be made liable for the death of a workman who had been killed by an explosion of firedamp. The negligence alleged was the negligence of the certificated manager, who had disregarded a rule laid down by r. 6 of s. 51 of 35 & 36 Vict. c. 76, to the effect that if at any time it is found by the person in charge of the mine that, by reason of noxious gases prevailing in the mine, the mine was dangerous, the men should be withdrawn; the manager had not

(1) (1864) 16 C. B. (N.S.) 669, at p. 694.
(2) 4 Times L. R. 324.
(3) 17 Times L. R. 235, 423.
(4) L. R. 10 Q. B. 62.
(5) L. R. 1 H. L. (Sc.) 326.

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withdrawn the men, though he had found the prevalence of noxious gases. It was held that the manager was a fellow-servant and that the colliery owners (a limited company) were not responsible. Lord Blackburn said: "It is a rule of law that the master who employs a servant (not an agent) is responsible for the negligence of that servant in matters in which he is employed; but there is this exception, which has been established by a series of decisions, that with regard to a fellow-servant the master is held not so responsible: because this negligence is to be taken as one of the ordinary risks which the servant contemplates and undertakes when entering into his employment. When the master personally interferes, he is liable for his personal negligence just as the individual servant would be." This statement of the law was approved of by Lord Watson in *Johnson* v. *Lindsay*. (1) It does not extend the rule of law as laid down in *Wilson* v. *Merry* (2), but it shews that it is applicable in cases of extreme danger.

Another class of case was cited to us, of which *Farrant* v. *Barnes* (3) and *Hughes* v. *Percival* (4) are examples. In the former case Willes J. lays down the general proposition of law that whenever a person employs another to carry an article which from its dangerous character requires more than ordinary care he must give him reasonable notice of the nature of the article, and that if he fails to do so he is responsible for the probable consequences of his neglect. Such a proposition cannot for a moment be disputed, but the question is whether it is applicable to the relations between master and servant where there is no negligence on the part of the master in that which the master has contracted with his servant to do, and the judgment of Willes J. does not deal with this question. *Hughes* v. *Percival* (4) was not a case of master and servant, but a case between adjoining owners. The House of Lords there held that, in an operation involving danger to the party wall belonging to the plaintiff and the defendant, the defendant could not get rid of responsibility by delegating the performance to a third party. The decision was founded on the authorities of *Pickard* v.

(1) [1891] A. C. 371, at p. 387.
(2) L. R. 1 H. L. (Sc.) 326.
(3) 11 C. B. (N.S.) 553.
(4) 8 App. Cas. 443.

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Smith (1) and *Dalton* v. *Angus*. (2) Lord Blackburn declined to approve the general proposition laid down in *Bower* v. *Peate* (3), and we think the case was decided upon the particular facts, namely, that the plaintiff being part owner of the wall, the defendant had a duty cast upon him in consequence of his using foundations on which the plaintiff had a right of support. Under these circumstances we cannot treat this case as an authority in favour of the proposition laid down by the learned county court judge. An American case was also cited to us, *Railroad Co.* v. *Fort* (4), a decision of the Supreme Court of the United States in the year 1873. That case was in some respects similar to the one which we are considering, and certainly was a case where the proposition of law laid down here by the learned county court judge was clearly applicable, but that was not the proposition of law laid down, and held by the Supreme Court to have been rightly laid down, by Dillon J. in his direction to the jury. He told the jury that if the work which the boy was ordered by Collett, the superintendent, to do was outside the contract of employment which had been made with the boy's father, then Collett, in giving the order (if it was within the scope of his duty to give such an order), must be taken as to that act to represent the company (which was presumed to be constructively present), and that if that act was negligent the company would be responsible for his negligence. Whether the direction to the jury was right or wrong, we do not think that this is at all in favour of the plaintiff's contention.

We have now reviewed the principal authorities, and have to decide whether the proposition of law laid down by the learned county court judge is warranted by authority or reason. First, we think that it is impossible to confine it to cases of children of tender age. The reason put for applying it to such cases is that a child of tender age presumably wants instruction and needs warning in dangerous employments; but this applies to every case where the servant is inexperienced, though, no doubt, the older the servant presumably the more experienced he is and the less instruction and warning he may require. It seems

(1) (1861) 10 C. B. (N.S.) 470.
(2) (1881) 6 App. Cas. 740.
(3) (1876) 1 Q. B. D. 321.
(4) 17 Wallace, 553.

impossible to lay down a hard and fast rule at the age of twenty-one years, or any particular age, or to confine the rule to any particular kind or degree of danger, or to any particular employment. And it would seem that the duty of the master differs only in degree, and not in kind, with the nature of the danger and with the age and experience of the servant. There seems no reason for holding, as the county court judge holds, that in all these cases the contract between the master and the servant is different from the ordinary contract between master and servant. Such a doctrine seems inconsistent with the law as laid down in *Wilson* v. *Merry* (1) and in *Howells* v. *Landore Steel Co.* (2) Work in a coal mine is almost necessarily dangerous, and a good system of ventilation is absolutely essential, and a defect in it may endanger the lives of hundreds of miners; yet it was held that the duty of arranging the system of ventilation might be delegated by the master, and that the master would not be liable for neglect on the part of the person to whom it was delegated. Can the obligation to give instruction and warning to young or inexperienced persons be put higher than the duty of providing efficient ventilation in a coal pit, and so much higher as to create an additional term of the contract?

We think that the rule to be deduced from the authorities is that the servant takes upon himself the risk of negligence on the part of his fellow-servants whatever position they hold, so long as they are fellow-servants, and there is no room, therefore, for the exception which the learned judge has engrafted upon it in the present case, namely, that there is on the part of the master a personal duty to be performed which, in dangerous employments and in the case of an infant, he cannot delegate to others. In one part of his judgment the learned county court judge says: "The injury of the plaintiff in the present case was not occasioned by any negligence of Miss Bass in connection with the gauging work, but through the neglect to give the plaintiff the warning." We suppose he meant to suggest that Miss Bass was not acting as a fellow-servant. This seems to us to be directly contrary to *Wilson* v. *Merry* (1), as is shewn by the following passage in Lord Watson's judgment in *Johnson* v.

(1) L. R. 1 H. L. (Sc.) 326. (2) L. R. 10 Q. B. 62.

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Lindsay (1): "I do not doubt that the language of the noble and learned Lord" (alluding to Lord Cairns in *Wilson* v. *Merry* (2)) "was simply intended to express his opinion, that to hold a fellow-servant who was in a sense the alter ego of the master, and who directed, but did not labour, in the common employment, was not a collaborateur was a strained and technical interpretation of the rule."

Some other points were put to us by the learned counsel who argued for the plaintiff, with the view of avoiding the necessity of going as far as the learned county court judge. It was argued that this was not one of the ordinary risks of the service within the rule, that the servant undertakes to run all the ordinary risks of the service, including the risk of negligence upon the part of the servant. It is to be observed that the rule as so stated is, not that the servant runs the risk of ordinary negligence upon the part of the fellow-servant, but that the negligence of a fellow-servant is an ordinary risk of the service. Once admitted, however, that a manager who is the alter ego of the master, and who directs, is a fellow-servant, it is difficult to see why his neglect to give proper instruction or warning is not ordinary negligence, or an ordinary risk of the service. Another point was that this plaintiff, being a child, could not have contemplated the risk, and, therefore, could not have undertaken to run it, but it appears from Lord Cairns' judgment that that is only given as the reason for the rule, not the rule itself. The rule is that the master as between him and his servant has not agreed to be responsible for the negligence of a fellow-servant. If it had to be shewn in every case that the servant contemplated the particular risk, a new limitation would be introduced to the rule, for which there is no authority. Lastly, it was said, though not seriously pressed, that a contract of employment such as laid down in *Wilson* v. *Merry* (2) could not be for the benefit of the infant. The only effect of that would be that the contract would not be binding on the infant, but it would not introduce a new term in the contract. We must, however, not be understood as giving any colour to the idea that such a contract is not for the benefit of the infant now that the very large remedies exist which have been given to

(1) [1891] A. C. 371, at p. 386. (2) L. R. 1 H. L. (Sc.) 326.

servants by the Employers' Liability Act and the Workmen's Compensation Act. Unfortunately the plaintiff was advised not to resort to these remedies, but to base her case entirely on the common law liability of the master.

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We feel obliged to hold that the law was not correctly laid down by the learned county court judge, and that the doctrine of common employment does apply in this case. We must, therefore, allow the appeal and direct judgment to be entered for the defendants, with costs here and below. If the plaintiff desires it, we think there should be leave to appeal.

Appeal allowed.

Solicitor for plaintiff: *F. E. Green.*

Solicitors for defendants: *Morris & Bristow, for William Morris, Birmingham.*

F. O. R.

[IN THE COURT OF APPEAL]

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SENIOR *v.* FOUNTAINS & BURNLEY, LIMITED.

June 6, 7, 20.

Master and Servant—Compensation—Dependants—Total or partial Dependency—Maintenance of Family by Workman—Workman's Earnings supplemented by Children's Wages—Claim of Widow—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 1 (*a*) (*i.*) (*ii.*)

The widow and young children of a workman are none the less "dependants wholly dependent on his earnings at the time of his death" within the meaning of the Workmen's Compensation Act, 1897, because the workman has been enabled through the receipt by him, or through his wife as his agent, of moneys from wage-earning children or of moneys coming to him through other channels to augment the fund out of which he has maintained his family.

APPEAL from an award of the county court judge sitting at Barnsley as arbitrator under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who met with a fatal accident on July 24, 1906, while working in the respondents' colliery. The widow claimed compensation for herself and three children, aged respectively six, ten, and thirteen. The deceased's wages for the three years preceding

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his death amounted to 300*l.* At the time of his death he was also receiving the wages of the three elder children, who were boys aged respectively nineteen, seventeen, and fifteen, for whom no claim was made. The wages of these children were 25*s.*, 18*s.* odd, and 15*s.* odd per week. The lads were fed, housed and clothed by their father, with whom they lived, and were supplied with pocket money by him. The learned county court judge found that by this mode of dealing with the lads the father was on the whole a gainer to some extent; the home as a whole was kept on a better footing than it otherwise would or could have been, and upon the whole he was satisfied that the father at his death was supported to some extent by the gain on the lads' wages as well as by his own earnings. The mother and the three younger children were wholly dependent on the receipts or income of the father. Upon these facts the learned county court judge came to the conclusion that the mother and younger children were not wholly dependent on the father's earnings within the meaning of the Act, and he awarded 250*l.* compensation.

The applicant appealed.

S. T. Evans, K.C., and *J. O. Andrews*, for the applicant. The learned county court judge was wrong in holding that the widow and young children were partial dependants only; he, in fact, finds total dependency, but draws a distinction between earnings and receipts. But the fact that the elder children earn something which they pay to the father does not change total dependency into partial dependency.

[They were stopped.]

Ruegg, K.C., and *J. A. Greene*, for the respondents. The test is, Is there total dependency on the earnings of the deceased at the time of his death? "Wholly dependent" means that there was no source of income during the lifetime of the deceased, other than his earnings, upon which the applicant was dependent: *Pryce* v. *Penrikyber Navigation Colliery Co.* (1) Here the family are supported by a fund arising from four sources—the father's wages and the wages of the three sons. Therefore they were not wholly dependent on the father's earnings. If one of the

(1) [1902] 1 K. B. 221.

wage-earning sons had died the father could have recovered compensation as a partial dependant on the sons: *Main Colliery Co.* v. *Davies.* (1) That shews that here the widow could not have been wholly dependent on the father's earnings.

S. T. Evans, K.C., in reply. If the wife can look only to the husband for her maintenance she is wholly dependent on her husband within the meaning of the Act, whether what the husband receives is strictly earnings or not, but when one comes to the amount of compensation one must look to the earnings received from the particular employer. "Partly dependent" is accounted for by the fact that the wife may have sources of income independently of her husband. [He cited *Marsh* v. *Boden* (2) and *Nelson* v. *Kerr & Mitchell.* (3)]

The COURT (Cozens-Hardy M.R., Sir Gorell Barnes, President, and Kennedy L.J.) reserved judgment.

June 20. KENNEDY L.J. delivered the judgment of the Court as follows:—

The Court has in this case to decide a short, but not unimportant, point arising under the Workmen's Compensation Act, 1897, in regard to the sum payable to the widow and three infant children of a deceased workman.

At and before the time of his death the workman, his wife, and six children lived together. Of these children the three elder, aged respectively nineteen, seventeen, and fifteen years, earned wages which they paid to their father. The father housed, fed, and clothed them, and allowed them certain weekly sums as pocket money, but, as the learned county court judge has found, there remained a balance of gain from their contributions. In these circumstances the household was no doubt better maintained by reason of these contributions than it would have been had the workman performed his legal obligation towards his family out of his own earnings alone. The question is whether, upon the facts stated, the workman having been killed in circumstances which justified a claim for compensation to his widow and

(1) [1900] A. C. 358. (2) (1905) 7 Minton-Senhouse, 110.
(3) (1901) 3 F. 893.

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children under the Act, the case ought to be treated as one of total dependency upon the earnings of the workman, or, as the learned judge has held, of partial dependency only. It appears from the judgment that he has arrived at his conclusion because he held himself bound as a matter of law to take into account the benefit to the family which arose from the addition to the workman's earnings of the weekly sums which the three elder sons paid to him; and it was argued before us by the respondents in support of the correctness of the judgment, as it was before the county court judge, that, as such receipts were not "earnings" within the meaning of the Act, and the children and their mother were at the time of the workman's death being maintained by the workman out of a fund of which his earnings, properly so-called, formed only one part and these receipts the other part, his widow and children, in the assessment of the statutory compensation payable to them upon his death, ought, as a matter of law, for that reason to be treated as persons who were "dependants in part dependent upon his earnings."

We are of opinion that this is not the true view. In our judgment a widow and children are, according to the true intent and meaning of the Act, none the less "dependants wholly dependent upon his earnings at the time of his death" because the workman has been enabled through the receipt by him, either directly or through his wife as his agent, of moneys from wage-earning sons or of moneys coming to him through other channels, to augment the fund out of which he has been legally bound to maintain, and has maintained, his household. It is no objection to this decision that, if in the father's lifetime one of these three wage-earning sons had died under circumstances within the purview of this Act, the father, who was in fact at the time of such son's death receiving help from him in the shape of the son's weekly contribution of his wages, might, according to the judgment of the House of Lords in *Main Colliery Co.* v. *Davies* (1), have successfully put forward a claim for compensation under this Act as a person "in part dependent upon his son's earnings," the father being in such a case, as is pointed out by the judgment of the Lord Chancellor (Lord Halsbury), in the

(1) [1900] A. C. 358.

case referred to, truly dependent, in fact, upon his son's earnings for the fulfilment of his legal obligation to maintain his family. But then, it is argued for the respondents, what meaning do you give to the distinction drawn by the Act between total dependence and partial dependence? In our judgment the true line of distinction is reasonably plain. If a workman's wife has at the time of her husband's death independent means of support of any kind, which neither are derived through or from her husband, nor could, without her consent, be appropriated by him, such as private income coming to her separately and apart from her husband, or money earned by her in business, as by keeping a shop, or in any other way separately and apart from her husband, the case is one of partial dependence upon the earnings of the husband. But the claim is not taken out of the category of total dependence upon those earnings because the husband, whilst he lived, was able, either through the receipt of contributions paid to him by others or through the enjoyment of a pension or other pecuniary addition to his earnings, to give his family a better maintenance than his earnings as a workman, without this supplementary income, would have enabled him to give them. The appeal must, therefore, be allowed, and an award of 300*l.* made in favour of the appellant, the apportionment of the compensation to be fixed by the learned county court judge, unless the parties agree in regard to it.

Ruegg, K.C., applied for a stay of execution with a view to an appeal to the House of Lords, but the Court refused to grant a stay.

Appeal allowed.

Solicitors: *Corbin, Greener & Cook, for Raley & Sons, Barnsley; Andrew Wood, Purves & Sutton, for J. Hewitt, Barnsley.*

H. B. H.

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[IN THE COURT OF APPEAL.]

DOUGLAS *v.* SMITH.

Parliament — Franchise — Dwelling-house — "Inhabitant Occupier" or "Lodger"—Resident Landlord—Prima facie Proof of Ground of Objection—Rebutting Evidence—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 3, *sub-s.* 2; *s.* 4—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5; *s.* 28, *sub-ss.* 10, 11.

At a court held by a revising barrister the appellant claimed to be entitled to the franchise of an "inhabitant occupier" of a dwelling-house under s. 3, sub-s. 2, of the Representation of the People Act, 1867, and s. 5 of the Parliamentary and Municipal Registration Act, 1878, notwithstanding a notice of objection that the appellant was not an inhabitant occupier, but a lodger.

The revising barrister found —

(1.) That the house, part of which was alleged to be separately occupied as a dwelling, was itself a house of the description popularly known as an ordinary dwelling-house.

(2.) That the immediate landlord to whom the person in question paid rent resided in the house.

(3.) That such landlord was rated for the entire house as a separate tenement:—

Held, that these facts constituted evidence upon which the revising barrister could decide that there was prima facie proof of the ground of objection within s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878.

In order to rebut the prima facie proof of the ground of objection the appellant produced a document signed by himself and his landlord containing (inter alia) a statement to the effect that the landlord had no control over the appellant's rooms; but the revising barrister did not accept the statements in the document as facts, and held that the document was not sufficient to rebut such prima facie proof:—

Held, that it was competent to the revising barrister to come to that conclusion.

Decision of Divisional Court affirmed.

Appeal from a decision of the Divisional Court (Lord Alverstone C.J. and Ridley and Darling JJ.) upon a case stated by the revising barrister for the parliamentary borough of Hackney. (1)

At a court held before the revising barrister, Henry Douglas, the appellant, by his agent Burton J. Dann, contended that,

(1) [1907] 1 K. B. 126.

notwithstanding a notice of objection dated August 20, 1906, delivered by Jonah Smith, the respondent, to the town clerk of Hackney, acting as overseer of the poor for the borough, the name of the appellant ought to be retained on the list of persons entitled to be registered as parliamentary electors for the parliamentary borough of Hackney, North Division, and as county electors for the administrative county of London, and as parochial electors for the metropolitan borough of Hackney.

The grounds of objection stated in the notice were (inter alia) as follows:—

4. That for twelve months immediately preceding July 15, 1906, the appellant had not been the inhabitant occupier of a dwelling-house in the premises specified in the list issued by the town clerk.

5. That within the said period the appellant was a lodger in apartments in a dwelling-house; that such apartments were not occupied by him free of any control of the landlord, and were not separately rated or rateable as for an occupier.

The name of the appellant had been placed on the list by the town clerk as a tenant occupier of a dwelling-house, being part of a house, such part being separately occupied (by that person) as a dwelling within the meaning of the Representation of the People Act, 1867, s. 3, and the Parliamentary and Municipal Registration Act, 1878, s. 5.

The revising barrister found as facts—

(1.) That the house, part of which was alleged to be separately occupied as a dwelling, was itself a house of the description popularly known as an ordinary dwelling-house.

(2.) That the immediate landlord to whom the person in question paid rent resided in the house.

(3.) That such landlord was rated for the entire house as a separate tenement.

In support of the objection it was submitted that these facts were prima facie proof of the ground of objection within the meaning of s. 28, sub-ss. 10 and 11, of the Parliamentary and Municipal Registration Act, 1878.

The revising barrister held that the facts were prima facie proof of the ground of objection (that is to say, that the appellant

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was not an inhabitant occupier as tenant of a dwelling-house within the meaning of the Acts, but that he had merely occupied the premises as a lodger).

On behalf of the appellant the following paper marked "B," which had been sent to the appellant and signed by him as well as by William Butler, the resident landlord, was produced, and it was contended that this was sufficient to rebut the prima facie proof afforded by the facts above mentioned.

"B.

"Dear Sir,—The Conservative agent objects to your vote. I should be glad if you would kindly answer the following questions so that I can defend your case. Kindly return as early as possible, and oblige

"Yours faithfully,

"Burton J. Dann.

"*General Remarks.*

"How long here?—Since November, 1899.

"How many rooms furnished or unfurnished?—Five rooms unfurnished.

"Has the landlord any right of entry to your rooms?—No.

"Have you keys and can you lock up the rooms?—Yes.

"Have you a key to the street door and can you come in when you like?—Yes.

"Has the landlord any control whatever over your rooms?—No.

"Dated 31st August, 1906.

"(Signed) Henry Douglas.

"P.S.—If possible, please get the landlord to sign also.

"Wm. Butler."

No further evidence was tendered. The revising barrister decided that the document "B" was not sufficient to rebut the prima facie proof afforded by the facts above mentioned which he had found. Accordingly he allowed the objection and expunged the name of the appellant from the list.

The revising barrister made a note in the margin of the case, the material part of which was as follows:—

"In the case of the appellant . . . . a claim had been made for a lodger's vote. This (in my opinion) strengthened to some extent the prima facie

proof afforded by my findings in fact (1.), (2.) and (3.) aforesaid; but I held that those findings in fact were sufficient prima facie evidence."

The revising barrister was of opinion that, if the Court held that his decision was wrong on either of the points above stated, the register ought to be amended by inserting the name of the appellant.

During the arguments in the King's Bench Division the Court requested the revising barrister (who was present) to state whether he found the facts stated in the document "B" proved. The revising barrister, in reply to the Court, stated orally that he did not intend to find that the facts so stated were proved.

The Divisional Court held that the revising barrister was justified in arriving at the conclusion that the objection was well founded, and dismissed the appeal.

The appellant appealed.

Danckwerts, *K.C.*, and *J. A. Johnston*, for the appellant. The question is whether the appellant is an inhabitant occupier of a dwelling-house or a lodger. For the purposes of the Representation of the People Act, 1867, under which the franchise is claimed, the term "dwelling-house" includes any part of a house where that part is separately occupied as a dwelling, and the term "lodgings" includes any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house; and where there is a separate occupation it is immaterial that the landlord is rated for the whole of the premises: Parliamentary and Municipal Registration Act, 1878, ss. 5, 14. The appellant having been placed on the occupiers' list by the town clerk, the onus is on the objector to give prima facie proof of the ground of objection as defined by s. 28, sub-s. 10, of the Act of 1878. In this case the facts found by the revising barrister are equally consistent with the voter being an occupying householder or a lodger, and, that being so, the revising barrister ought to have held that the objector had failed to discharge the onus which was cast upon him, and in holding that these facts were prima facie proof of the ground of objection he has misdirected himself in point of law.

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[KENNEDY L.J. referred to *Pomfret* v. *Lancashire and Yorkshire Ry. Co.* (1)]

The test of whether a part of a house is separately occupied or not is, Does the landlord retain his character of master of the house?—*Toms* v. *Luckett*. (2) It is immaterial whether the house is structurally severed or is arranged as an ordinary dwelling-house: *Allchurch* v. *Hendon Union* (3); whether the landlord or the occupier pays the rates: *Bradley* v. *Baylis* (4); whether the landlord resides on the premises or not. The question is, In what capacity does he reside? In order to negative separate occupation he must so reside as to retain the paramount control over the house as master, including the rooms occupied by the voter: *McLaughlin* v. *Chambers*. (5) *Kent* v. *Fittall* (6), when looked at as a whole, is to the same effect. It is true that in the latter case it was admitted in argument that the residence of the landlord was evidence in determining whether his tenants were occupiers or lodgers, but that admission ought not to have been made. The mere fact that the landlord resides on the premises creates no presumption one way or the other.

[KENNEDY L.J. In Rogers on Elections, 16th ed. vol. 1, p. 337, it is stated that no appeal lies against the decision of the revising barrister that the objector has not made out a prima facie case; and *McDaid* v. *Chambers* (*Keown's Case*) (7) is cited in support of that proposition.]

That proposition is stated too widely. *Keown's Case* (7) only decided that in the particular circumstances the Court ought not to interfere.

The Divisional Court, in affirming the decision of the revising barrister, misapprehended the effect of *Kent* v. *Fittall* (6), and Darling J. was influenced by the fact that the voter had put forward an alternative claim as a lodger; but that is really not relevant to the question at issue, and ought not to prejudice

(1) [1903] 2 K. B. 718.
(2) (1847) 5 C. B. 23, 38, per Maule J.
(3) [1891] 2 Q. B. 436.
(4) (1881) 8 Q. B. D. 195.
(5) [1896] 2 I. R. 497.
(6) [1906] 1 K. B. 60.
(7) (1894) 29 Ir. L. T. 81; 2 Lawson's Reg. Cas. 50.

the appellant's case: *Cuthbertson* v. *Hains* (1); *Hains* v. *Cuthbertson*. (2)

Further, assuming that the revising barrister was right in holding that the objector had made out a prima facie case, he ought to have accepted the rebutting evidence as an answer to the objection. If a written statement signed by the landlord and the voter that the landlord has no control over the rooms occupied by the voter is not to be accepted, the only alternative is to bring the landlord into Court; but the voter has no power to do that, and the practical result will be that a large number of occupiers of small tenements will be disfranchised.

Lewis Coward, K.C., and *W. H. Clay*, for the respondent.

COZENS-HARDY M.R. This appeal has been opened to us by Mr. Danckwerts in a very elaborate, interesting, and plausible argument. I fully recognize the importance of the case to a large class of voters, and if I felt any doubt as to the accuracy of the judgments in the Court below I should, of course, have called upon counsel for the respondent to assist us; but this seems to me to be an exceedingly plain case. The facts may be shortly stated. Douglas was put upon the occupation list as a voter. The notice of objection was served upon him, not by the overseers, but by another person who was qualified to serve an objection. The notice of objection, so far as it was material, was "that within such qualifying period you were a lodger in apartments in a dwelling-house; that such apartments were not occupied by you free of any control of the landlord; and were not separately rated or rateable as for an occupier." In that state of things the position as defined by the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-s. 10, was this, that the objector had to give prima facie proof of the ground of objection. Those words "prima facie proof," if they stood alone, would have involved, no doubt, the giving of such proof as, according to the law of England, would be regarded as evidence, and satisfactory evidence, to prove the issue which lay upon the objector; but the Act goes on to say: "The prima facie proof shall be deemed to be given by the

(1) (1868) L. R. 4 C. P. 525. (2) (1868) L. R. 4 C. P. 528, n.

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objector if it is shewn to the satisfaction of the revising barrister by evidence, repute, or otherwise that there is reasonable ground for believing that the objection is well founded, and that by reason of the person objected to not being present for examination, or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to." Then by sub-s. 11: "If such proof is given by the objector as herein prescribed"—that is to say, of the nature which I have just read—"then unless the person objected to appears by himself or by some person on his behalf and proves that he was entitled . . . . the revising barrister shall expunge the name of the person objected to." Here the revising barrister has found the following facts. [The Master of the Rolls read the findings of fact in the case, and continued:—] It was submitted on behalf of the objector that those facts were prima facie proof of the ground of objection within the meaning of the provision I have just read, and the revising barrister so held. In my judgment that was a conclusion which it was competent for the revising barrister to arrive at. It has been argued before us that *Kent* v. *Fittall* (1) is decisive of this case. I think it is decisive of this case, but decisive in exactly the opposite sense to that contended for by the appellant. I take the passage in the judgment of the late Master of the Rolls on page 70 of the report to be a statement of his view of the law applicable to a case like this. It had been supposed to have been decided by the Court below in that case that, given the fact that you had a house in which the landlord himself was residing, and in respect of which he was rated as occupier, that was conclusive evidence that a person who was occupying some portion of that house could not be put upon the occupation franchise, but must be put on the lodger franchise. The Court of Appeal decided that it was not conclusive evidence, and that the revising barrister, who had found as a fact in that case that "Frank Herbert has the exclusive occupation, use, and enjoyment of his room or dwelling, and the landlord neither does nor has by agreement or otherwise any right to enter or in any way interfere with or exercise any control or dominion over the room," was justified in coming to

(1) [1906] 1 K. B. 60.

the conclusion that he was an occupier within the meaning of the Act, notwithstanding that the landlord lived in the same house. But Lord Collins, in the passage I have referred to, says this: "It is not disputed"—by which he means that it cannot be disputed—"that in dealing with the occupation of part of a dwelling-house, if the landlord is living in the house, that fact creates a presumption that the occupation of the other part is that of a lodger rather than that of an inhabitant occupier. But while that is the inference that may be drawn, it is not a necessary inference of law, and there is no authority that it is to be treated as conclusive." In the face of that observation, which if it be only a dictum—though I think it was more than that—is one with which I desire to express my concurrence, it is impossible for us to hold that it was not open to the revising barrister to say that the facts which he has found in this case satisfied him that there was reasonable ground for believing that the objection was well founded. I only mention in passing, though I do not for a moment deny it was an element worthy of his consideration, that the revising barrister had before him the fact that this same man Douglas had in respect of this same property made a statutory declaration that he was a lodger and entitled to the lodger franchise. Under all these circumstances it seems to me plain that the event happened which brought sub-s. 11 of s. 28 into operation, and that it then was for Douglas to prove the facts which were necessary to establish his right to be inserted on the list of occupying voters; in fact, the onus was thereby shifted.

Then it was faintly argued that that onus had been discharged by the production of document "B." I do not think we ought to listen for a moment to that argument after what took place in the Court below. It must not be forgotten that the revising barrister in these matters stands in a very peculiar position. By s. 65 of the Parliamentary Registration Act, 1843, "no appeal or notice of appeal shall be received or allowed against any decision of any revising barrister on any question of fact only, or upon the admissibility or effect of any evidence or admission adduced or made in any case to establish any matter of fact only." For these reasons, which are substantially those of

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the Divisional Court, I think that this appeal fails and must be dismissed with costs.

SIR GORELL BARNES, PRESIDENT. I agree. I do not think I can usefully add anything to the very clear judgment of the Master of the Rolls, which has covered all the points.

KENNEDY L.J. I am of the same opinion. There are two grounds of complaint alleged before us in regard to the judgment of the Divisional Court. The first ground of complaint is that there was not sufficient evidence before the revising barrister to justify him in saying that there was prima facie proof of the ground of objection. It seems to me that this is purely a question of fact for the revising barrister. By the terms of the section which has been referred to by the Master of the Rolls there is great latitude in the character of the evidence which the revising barrister may accept as prima facie proof of the ground of objection, and in this case it is impossible in my opinion—and that is what the appellant must contend for—to say that the evidence which was before him, and upon which he found the facts, could not in law be sufficient to justify his treating those facts as constituting a good ground of objection to the claim. It is stated in the case that the house was one of the description popularly known as an ordinary dwelling-house, and that the immediate landlord to whom the appellant paid rent resided in the house. Different considerations might arise if the house had been a house structurally divided into dwellings for separate occupation. There the mere fact that the landlord lived in the house, it being not an ordinary dwelling-house but one which was intended for persons to live in as separate occupiers, might have been of much less importance. But it is impossible to say that where you have an ordinary dwelling-house constructed apparently for the occupation of a family, and the landlord is actually resident on the premises, that fact may not be properly considered as some evidence against a claim put forward by one who claims that he separately occupies as a dwelling-house a portion of those premises. I think, indeed, the learned revising barrister might go further and say, in answer

to this part of the appellant's complaint, that it has been laid down by Lord Collins, then Master of the Rolls, in the passage in *Kent* v. *Fittall* (1) which has been read by the present Master of the Rolls, that there is a presumption, if we were to treat this as a matter of law, in a case of this kind, that, if the landlord lives in the dwelling-house, the occupation of the other part is rather that of a lodger than that of an inhabitant occupier; and he might have said, "I shall be doing that which is contrary to a high authority if I do not treat this fact as prima facie sufficient to create a presumption that the claimant is really a lodger and not an occupier."

Then the second ground of complaint is that the revising barrister was bound in law to accept the evidence tendered in rebuttal—in other words, to accept this paper "B," with the signatures to it and the statements in it, as entirely dissipating any objection which he might have entertained to the allowance of the vote on the facts as they stood before that paper was produced. To my mind there again there arises the vital objection to such an argument, that it is not a question of law at all. He has to consider the weight of this evidence—a document containing a number of statements signed by the appellant, and signed also by the landlord, with regard to the way in which this house was occupied by the appellant—and he was not satisfied that this paper ought to remove the objection, which prima facie was good. There is no rule of law which bound him to decide in favour of the man who was seeking to vote; and just as in *Kent* v. *Fittall* (1) it was held by the Court of Appeal—and that was all that was decided—that there was nothing in the facts there found which ought to be treated as conclusive in point of law, so I say here, whatever might be the effect of such a document as this, which must vary with the circumstances of each case, the revising barrister was certainly not bound to accept it as forcing him to a conclusion to which he did not think he was bound to come on a proper consideration of all the facts, fairly taken together.

Appeal dismissed.

Solicitors: *Radford & Frankland; W. Herbert Bishop.*

(1) [1906] 1 K. B. 60.

H. B. H.

1907
June 19.

THE KING *v.* HUTTON AND ANOTHER.
Ex parte METROPOLITAN WATER BOARD.

Waterworks—Non-payment of Rate—Cutting off Water—Condition precedent—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 140—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *s.* 74.

It is not a condition precedent to the right of a water company to recover a water rate under s. 74 of the Waterworks Clauses Act, 1847, that the water company should have exercised the power of cutting off the water conferred by that section.

RULE nisi calling upon a metropolitan magistrate and one W. Watson to shew cause why the magistrate should not hear and determine a complaint preferred by the applicants, the Metropolitan Water Board, against Watson, claiming certain arrears of water rates for the two quarters to Lady Day, 1907.

On March 11, 1907, a summons was issued on the complaint made by the applicants against Watson to recover 19*s.* 2*d.* due to them for water supplied to Watson at the premises situate at 389, New North Road, Islington. The proceedings were taken under s. 74 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), by s. 85 of which statute the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 140, is incorporated. Sect. 74 of the Waterworks Clauses Act, 1847, provides that "If any person supplied with water by the undertakers . . . . neglect to pay such water rate at any of the said times of payment thereof, the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate due from such person, if less than twenty pounds, with the expenses of cutting off the water, and costs of recovering the rate, in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act. . . . ."

By s. 85 the Railways Clauses Consolidation Act, 1855, is incorporated. Sect. 140 of the Railways Clauses Consolidation Act, 1845, provides that "In all cases where any damages, costs,

or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices; and if the amount so ascertained be not paid by the company or other person liable to pay the same within seven days after demand, the amount may be recovered by distress of the goods of the company or other party liable as aforesaid; and the justices by whom the same shall have been ordered to be paid, or either of them, or any other justice, on application, shall issue their or his warrant accordingly."

At the hearing before the magistrate the defendant did not appear, but the Water Board appeared by counsel, and called as a witness a collector of the board, who proved that the sum of 19*s.* 2*d.* was due from the defendant to the Water Board for water supplied and had been duly demanded and was still unpaid, but that the water had not been cut off from the defendant's premises and was still being supplied.

The magistrate, being of opinion that cutting off the water was a condition precedent to taking any proceeding under s. 74 of the Waterworks Clauses Act, 1847, dismissed the summons.

George Jones (*S. P. J. Merlin* with him) shewed cause. It is a condition precedent to the right of the applicants to take proceedings under s. 74 of the Waterworks Clauses Act, 1847, which by s. 85 incorporates s. 140 of the Railways Clauses Consolidation Act, 1845, that they should cut off the water from the premises in respect of which the water rate is payable. The Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), applies to these proceedings, and the magistrate must be satisfied that he has jurisdiction before he hears the summons. The magistrate could have made an order for payment under s. 21 of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), without the water being cut off, and the summons ought to have been taken out under that section; but under s. 74 of the Waterworks Clauses Act, 1847, the water must be cut off before the summons is issued:

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East London Waterworks Co. v. *Charles.* (1) [Sect. 70 of the Waterworks Clauses Act, 1847, was also referred to.]

Danckwerts, K.C., and *Courthope-Munroe*, in support of the rule, were not called on.

LORD ALVERSTONE C.J. In this case I feel sure there has been some misconception. I am satisfied from the authorities that summonses for non-payment of water rates have been issued for a great many years. The power to issue them rests upon s. 140 of the Railways Clauses Consolidation Act, 1845, which shews that the method in which a water rate may be recovered under s. 74 of the Waterworks Clauses Act, 1847, is by proceedings taken before justices; and the Summary Jurisdiction Acts have in more than one case been applied to summonses for the recovery of water rates. I need only to refer to *East London Waterworks Co.* v. *Charles.* (1) There are other decisions from which it appears that the power of a magistrate to issue summonses has been controlled by certain conditions in the Summary Jurisdiction Acts. Sect. 74 of the Waterworks Clauses Act, 1847, gave a further power to cut off the water, and allowed the expense of cutting it off to be recovered in the same way as the water rate due, thus giving the water company additional power. The Water Board have power under s. 70 of the Waterworks Clauses Act, 1847, to demand the water rate before the water has been supplied. That assumes that the person who has paid the rate will be supplied with the water. It is really a contradiction in terms to say that the applicants cannot summon a person for the water rate unless they have cut the water off, when ex hypothesi they can summon him in respect of a payment for water to be supplied in the future. A mistake has arisen from confusing the two remedies of the Water Board. If the summons had claimed the expense of cutting off the water, a different question would have arisen, but the only claim is for 19*s.* 2*d.* for water rate.

I am of opinion that the magistrate ought to have entertained the case.

(1) [1894] 2 Q. B. 730.

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DARLING J. I am of the same opinion. It seems to me that to hold otherwise would be very oppressive to those who use the water. It would oblige a water company before they could recover a rate to stop the supply of water to the premises, a course which might lead to all manner of insanitary trouble. I cannot for a moment imagine that the Legislature intended to enact anything of the kind, nor do I think that the words of the Act of 1847 afford any ground for so thinking.

A. T. LAWRENCE J. I agree.

Rule absolute.

Solicitor for applicants: *Walter Moon.*
Solicitor for respondent Watson: *A. G. Lewis.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1907
May 6, 8.

THE KING *v.* MIDDLESEX JUSTICES. *Ex parte* WALSALL UNION.

Poor Law—Settlement—Division of Parish—Part of Parish added to other Parish by Order of County Council—Confirmation of Order by Local Government Board—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *ss.* 57, 59; *Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 36, 42.

By s. 42 of the Local Government Act, 1894, "When an order under s. 57 of the Local Government Act, 1888, has been confirmed by the Local Government Board, such order shall at the expiration of six months from that confirmation be presumed to have been duly made, and to be within the powers of that section, and no objections to the legality thereof shall be entertained in any legal proceeding whatever." By s. 36, sub-s. 10, of the Local Government Act, 1894, an order made by a county council in pursuance of Part III. of that Act is to be deemed to be an order under s. 57 of the Act of 1888.

A joint committee of a county council and of the council of a county borough made an order with regard to a parish which, at the passing of the Local Government Act, 1894, was situate in more than one urban district, which order, in providing for the union of part of the parish with another parish and the constitution of the remaining part into a separate parish, further provided that the alteration of the parish should not have the effect of destroying settlements already acquired therein prior to the coming into operation of the order:—

Held that, whether the order was made under the Local Government

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Act, 1888, or the Local Government Act, 1894, and whether or not there was originally jurisdiction to insert in the order the provision dealing with pauper settlements, s. 42 of the Local Government Act, 1894, applied, and no objection to the legality of the order could be entertained, more than six months having elapsed since its confirmation by the Local Government Board.

Decision of the Divisional Court, [1906] 2 K. B. 365, affirmed.

APPEAL of the Walsall Union from a decision of the Divisional Court (Lord Alverstone C.J., Darling and Channell JJ.) (1) upon the argument of a rule nisi for a mandamus directed to the justices of Middlesex sitting in quarter sessions requiring them to shew cause why they should not hear and determine an appeal from an order of justices adjudging the place of the last legal settlement of one Annie Olive Kent to be in the parish of Walsall and Walsall Union.

Annie Olive Kent was born on May 1, 1902, in the Brentford Union Workhouse. She was the illegitimate child of Sarah Anne Kent, who was the daughter of one Henry Kent. Sarah Anne Kent was born at Birmingham on April 16, 1880, and she attained the age of sixteen years on April 15, 1896, when she took the settlement of her father. Before the Local Government Act, 1894, came into operation, Henry Kent had a settlement in the parish of Walsall Foreign.

Before the Local Government Act, 1894, the parish of Walsall Foreign was one parish, part of which was situate in the municipal borough of Walsall and the other part in the urban sanitary district of Brownhills; and, as such parish was at the date of the passing of the Local Government Act, 1894, situate in more than one urban district, the parts of the parish in each district (subject to the order hereinafter mentioned) became separate parishes by virtue of s. 36, sub-s. 2, as from the appointed day in that Act mentioned.

In July, 1894, an order reciting a number of sections of the Local Government Acts, 1888 and 1894, was made by a joint committee of the county council of Stafford and of the council of the county borough of Walsall, which order was, with certain modifications, confirmed by the Local Government Board on October 19, 1894, and was to come into operation upon the

(1) [1906] 2 K. B. 365.

appointed day as defined by s. 84 of the Local Government Act, 1894. The order so modified, after reciting that no petition had been presented against it, provided (inter alia) that that portion of the parish of Walsall Foreign which was in the urban sanitary district of Walsall county borough should be united with the parish of Walsall borough under the name or title of the parish of Walsall, and that the remaining portion of the parish in the urban sanitary district of Brownhills should be known as the parish of Walsall Wood. The order, as amended by the Local Government Board, further provided that the new parishes constituted by it should be included in and form part of the Walsall Union; and it also contained the following clauses:—

"9. Every person who has acquired or who on or before the date of the operation of the order shall acquire a settlement in any of the existing parishes mentioned in arts. 1 and 2 of the order [these included the parish of Walsall Foreign] shall be deemed to have acquired a settlement in the parish comprising the place in which the acts or circumstances conferring such settlement shall have been done or occurred. If such acts or circumstances shall have been done or occurred in more than one place, such settlement shall be according as the last place of residence of such person shall have been at the time of acquiring such settlement.

"10. Any person who shall have acquired a status of irremovability from any of the existing parishes mentioned in arts. 1 and 2 of the order shall be deemed to have acquired a status of irremovability from the parish in which he shall reside on the date of the operation of the order, or (if he shall then be in receipt of relief) from the parish comprising the place in which he was residing at the time of becoming chargeable."

An order having been made by two justices for the removal of Annie Olive Kent from Brentford Union to Walsall Union, the guardians of Walsall Union appealed to quarter sessions. Upon the hearing of the appeal they contended that, by reason of the Local Government Act, 1894, the parish of Walsall Foreign, in which Henry Kent had a settlement, was destroyed, and that the settlement of Henry Kent and his daughter Sarah Anne Kent (the mother of Annie Olive Kent) in that parish was destroyed;

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that so far as the order of the joint committee purported to deal with the question of settlements it was ultra vires; and that, in consequence, the pauper, Annie Olive Kent, had no settlement in the parish of Walsall or in Walsall Union.

The quarter sessions, as appeared from affidavits filed in support of the rule, held that they had no jurisdiction to go behind the order of the joint committee, which had been duly confirmed by the Local Government Board, and they declined to hear counsel as to its validity, and in consequence dismissed the appeal. The present rule was then obtained at the instance of the guardians of the Walsall Union.

The Divisional Court discharged this rule upon the ground that the order of the joint committee might properly provide that the alteration of the parish should not have the effect of destroying existing settlements. (1)

The guardians of the Walsall Union appealed.

C. A. Russell, K.C., and *Disturnal*, for the appellants, the Walsall Union. Clauses 9 and 10 of the order, which affected to make an alteration in the ordinary law of settlement, were bad. The effect of the division of a parish is that settlements gained in the undivided parish are lost: *Reg.* v. *Tipton* (2); and this principle of law is not affected by the Divided Parishes Act, 1876: *Dorking Union* v. *St. Saviour's Union.* (3) In the present case the division of the parish of Walsall Foreign was not effected by the order of the county council, but was made by s. 36, sub-s. 2, of the Local Government Act, 1894, which provides that "where a parish is at the passing of this Act situate in more than one urban district, the parts of the parish in each such district shall, as from the appointed day, unless the county council for special reasons otherwise direct, and subject to any alteration of area made by or in pursuance of this or any other Act, be separate parishes, in like manner as if they had been constituted separate parishes under the Divided Parishes and Poor Law Amendment Act, 1876, and the Acts amending the same." There was no substantive order of the

(1) [1906] 2 K. B. 365. (2) (1842) 3 Q. B. 215.
(3) [1898] 1 Q. B. 594.

county council for the division of the parish, and therefore clause 9 of the order is not good as a consequential order dealing with matters arising upon an order for the division of a parish. The division of the parish being statutory, the county council could not, except so far as authorized by s. 36, sub-s. 3, of the Act of 1894 (which deals with parochial charities and parish documents), make any order relating to that division; they have, however, provided for something which is not included in the matters with which they have power to deal. It is plain from the recitals in the order that the county council were affecting to deal with the matter under s. 36, sub-s. 2, of the Act of 1894; the case is therefore not affected by s. 36, sub-s. 8, which gives a county council power in certain cases to provide for the division of a parish by an order which requires the confirmation of the Local Government Board. (1) The order was not made under Part III. of the Act of 1894, and it contains invalid matter, in respect of which it cannot be deemed under s. 36, sub-s. 10, of that Act to be an order under s. 57 of the Local Government Act, 1888. (2) Nor is the case affected by s. 59 of the Act of 1888, which clearly applies only to orders dealing with administrative or judicial arrangements incident to alterations in areas, and the adjustment of property and liabilities (3); the language

(1) The Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 36, sub-s. 8, provides: "Where the alteration of the boundary of any parish, or the division thereof or the union thereof or of part thereof with another parish, seems expedient for any of the purposes of this Act, provision for such alteration, division, or union may be made by an order of the county council confirmed by the Local Government Board under s. 57 of the Local Government Act, 1888."

By s. 36, sub-s. 10: "Subject to the provisions of this Act, any order made by a county council in pursuance of this part of this Act shall be deemed to be an order under s. 57 of the Local Government Act, 1888. . . . ."

(2) The Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 57, provides by sub-s. 1 (*b*) for (inter alia) the division of a parish or its union with any other parish or the transfer of part of a parish to another parish. The order may be made by the county council after an inquiry in the locality; and if it is not successfully petitioned against the order is to be confirmed (with such modifications as may be considered necessary) by the Local Government Board, and to be laid upon the table of both Houses of Parliament.

(3) The Local Government Act, 1888, s. 59, sub-s. 1: "A scheme or order under this Act may make such administrative and judicial arrange-

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of that section does not authorize the inclusion in the order of provisions affecting the ordinary law of settlement. Such provisions are neither necessary nor proper for giving full effect to the order, nor can they properly be described as an adjustment of property, debts, and liabilities affected by the order.

The defect in the order is not cured by s. 42 of the Act of 1894. (1) That section might cure mistakes in an order (even if they arose from an excess of authority) where the county council were nevertheless acting in pursuance of their statutory powers; but it cannot validate an order made, as the provision respecting settlements was made in the present case, without a shadow of authority and altogether outside the scope of the Act. And this order was not an order under s. 57 of the Act of 1888, to which class of orders alone s. 42 of the Act of 1894 applies.

Macmorran, K.C. (*R. Cunningham Glen* and *A. A. Bethune* with him), for the respondents, the Brentford Union. The order of the joint committee was valid, and the Divisional Court were right in discharging the rule. The order is one that could have been made under s. 57 of the Local Government Act, 1888, without reference to the Act of 1894, and it could have been made before the latter Act was passed. Sect. 57, sub-s. 1 (*b*), which gives power to a county council to make an order for the division of a parish and the transfer of part of a parish to another parish, covers all that has been done in the present case. Further, the joint committee could properly make an

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ments incidental to or consequential on any alteration of boundaries, authorities, or other matters made by the scheme or order as may seem expedient."

By sub-s. 4: "Any scheme or order made in pursuance of this Act may, so far as may seem necessary or proper for the purposes of the scheme or order, provide for all or any of the following matters, that is to say, ... (*d*) may provide for all matters which appear necessary or proper for bringing into operation and giving full effect to the scheme or order; and (*e*) may adjust any property, debts, and liabilities affected by the scheme or order."

(1) The Local Government Act, 1894, s. 42: "When an order under s. 57 of the Local Government Act, 1888, has been confirmed by the Local Government Board, such order shall at the expiration of six months from that confirmation be presumed to have been duly made, and to be within the powers of that section, and no objection to the legality thereof shall be entertained in any legal proceeding whatever."

order dealing with settlements under s. 59, sub-s. 4 (*d*), as being a matter necessary or proper for giving effect to the order for division. These provisions as to existing settlements have in fact been inserted by the Local Government Board in every order of this kind made by a county council, the object of such a clause being not to preserve the status of the individual pauper, but to preserve the liability of the parish which that status involves. The provision in clause 9 of the order therefore falls within s. 59, sub-s. 4 (*e*), of the Act of 1888, for the expression "liabilities affected by the scheme or order" includes the liability to maintain paupers settled in the parish.

Assuming, however, that the division of the parish was effected by the Act itself, and not by the order of the joint committee, it amounts to an alteration of area made by the Act of 1894 within the meaning of s. 69 of that Act (1), which authorizes in such a case the making of an order for any of the matters mentioned in s. 59 of the Act of 1888. But the better view is that this order is to be deemed to be an order made under s. 57 of the Act of 1888, which has been confirmed by the Local Government Board, in which case it is made unimpeachable by s. 42 of the Act of 1894. That section was intended to prevent objections being taken to the validity of an order after it had been in force for six months, and the order in the present case cannot be questioned after the expiration of six months from the date of its confirmation.

C. A. Russell, K.C., in reply. Sect. 69 of the Act of 1894 is not in point, for the division of a parish is a very different thing from the alteration of its area.

VAUGHAN WILLIAMS L.J. I do not consider it necessary to deliver a long judgment, or to decide all the numerous questions which have been argued on this appeal. There has been considerable discussion as to what was the legislative authority under which the order in question was made; one suggestion is

(1) The Local Government Act, 1894, s. 69: "Where an alteration of any area is made by this Act, an order for any of the matters mentioned in s. 59 of the Local Government Act, 1888, may, if it appears to the county council desirable, be made by the county council, or, in the case of an area situate in more than one county, by a joint committee of county councils, but nothing in this section shall empower a county council or joint committee to alter the boundaries of a county."

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that it was made under the Act of 1894 itself, and another that it was made under s. 57 of the Act of 1888. In my opinion that question is immaterial, because, under whichever authority the order was made, having regard in the one case to s. 36, sub-s. 10, of the Act of 1894, which introduces all the powers and provisions in reference to an order made under s. 57 of the Act of 1888, and having regard in the other case to s. 69 of the Act of 1894, the order here is one which could properly be made under the authority of one or other of those Acts. In any event, it is an order which has been confirmed by the Local Government Board; it is therefore covered by s. 42 of the Act of 1894, which provides that "When an order under s. 57 of the Local Government Act, 1888, has been confirmed by the Local Government Board, such order shall at the expiration of six months from that confirmation be presumed to have been duly made, and to be within the powers of that section, and no objections to the legality thereof shall be entertained in any legal proceeding whatever." In my opinion, whichever way we take it that legislative authority covers the particular order, in either case s. 42 is applicable. In other words, s. 42 applies even if the division of the parish was made under s. 36, sub-s. 2, of the Act of 1894. I do not think it necessary to say more than that I rely on s. 42, and that, upon that ground, the judgment of the Divisional Court should be affirmed.

FLETCHER MOULTON L.J. I am of the same opinion, and for the same reasons. The fundamental fallacy in the argument for the appellants lies in construing the word "order" as referring to a single direction out of several directions contained in an order made under these Acts. In my opinion the "order" is the whole document, and I therefore think that by reason of s. 36, sub-s. 8, of the Act of 1894, among other reasons, this was an order made in pursuance of Part III. of that Act. That being so, the effect of s. 36, sub-s. 10, is that it is to be deemed to be an order under s. 57 of the Local Government Act, 1888. I see no difficulty in so holding arising from the contents of the order, because s. 59, sub-s. 4 (*d*), of the last-named Act enacts that a scheme or order made in pursuance of that Act may (inter

alia) provide for all matters which appear necessary or proper for bringing into operation and giving full effect to the scheme or order. Then we must apply s. 42 of the Act of 1894, which provides that "When an order under s. 57 of the Local Government Act, 1888, has been confirmed by the Local Government Board, such order shall at the expiration of six months from that confirmation be presumed to have been duly made, and to be within the powers of that section, and no objections to the legality thereof shall be entertained in any legal proceeding whatever." The language of the section is precise. Not only is the order to be presumed to have been duly made, but no objection to its legality is to be entertained. We cannot, therefore, entertain the objections which have been taken to the order in the present case.

BUCKLEY L.J. I am of the same opinion. I think, though it is not necessary to decide the point, that Mr. Russell was right in his contention that the division of this parish was effected by s. 36, sub-s. 2, of the Local Government Act, 1894, and that the words "unless the county council for special reasons otherwise direct" merely gave power to a county council for good reasons to prevent the section from having any effect in the case of a particular parish. Under s. 36, sub-s. 8, it was competent for this county council to come to the conclusion that the union of a part of the parish of Walsall Foreign with another parish was expedient, and provision for that union might be made by an order of the county council confirmed by the Local Government Board under s. 57 of the Act of 1888. It results, therefore, that the order was an "order made by a county council in pursuance of this part of this Act" within the meaning of s. 36, sub-s. 10 (for it was made in pursuance of s. 36, sub-s. 8); and was under that same sub-section (sub-s. 10) to be deemed to be an order under s. 57 of the Local Government Act, 1888. Looking then at s. 36, sub-s. 2, of the Act of 1894, which speaks of an "alteration of area made in pursuance of this Act," I find that, if the division of the parish is made under the Act, s. 69 is to apply. In my opinion the word "area," as used in s. 69, means the area of a borough or parish; see s. 36, sub-s. 11, which deals with the "areas referred to in s. 57 of the Local

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Government Act, 1888." That being so, it is clear that s. 69 applies to this case.

Coming now to the Act of 1888, I find that s. 57 gives a county council power (inter alia) to entertain a proposal for transferring part of a parish to another parish, and to make an order for the purpose of carrying it out; this is what is done under s. 36, sub-s. 8, of the Act of 1894. Machinery is provided in s. 57 by which the proposal is to be subject to review and inquiry. Then s. 59 provides for various matters which may be dealt with in such a scheme or order, and sub-ss. 4 (*d*) and (*e*) of that section deal with matters which are material to the present case. The question which now arises is whether the order could properly include such a provision as that which appears in clause 9, a provision which deals with the question of pauper settlements. I think it is unnecessary to decide whether s. 59 authorizes the insertion of such a provision or not, and I prefer to express no opinion on the point, though I should be somewhat surprised if it were held not to authorize it. All necessity for deciding the point is taken away by s. 42 of the Local Government Act, 1894, which in my opinion plainly says that when an order, whether it be within the powers of s. 57 of the Act of 1888 or not, has been confirmed by the Local Government Board, it is to be presumed to have been duly made and to be within the powers conferred by s. 57, even though in fact it is not within those powers, with the result, in the words of s. 42, that no objection to its legality can be entertained. Therefore, even on the assumption that neither s. 57 nor s. 59 authorized the inclusion of clause 9 in the order, that has taken place which compels me to assume that the order was in that respect within the powers conferred by those sections on the county council. In my judgment s. 42 covers the whole of the ground in this case, and the appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for Walsall Union: *Smiles & Co., for A. H. Lewis, Walsall.*

Solicitors for Brentford Union: *Ruston, Clark & Ruston.*

W. J. B.

[IN THE COURT OF APPEAL.]

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1907
May 30;
June 20.

KYDD *v.* WATCH COMMITTEE OF LIVERPOOL.

Justices—Quarter Sessions—Jurisdiction of High Court—Practice—Case stated from Quarter Sessions—Enactment that Order of Quarter Sessions shall be Final—Pension of Police Constable—Police Act, 1890 (53 & 54 *Vict. c.* 45), *s.* 11.

By s. 11 of the Police Act, 1890, it is provided that in certain cases within the section, where a constable is aggrieved by the decision of the police authority, he may apply to a Court of quarter sessions, and "that Court, after inquiry into the case, may make such order in the matter as appears to the Court just, which order shall be final."

Where a recorder sitting in quarter sessions had, on an application under the above-mentioned section, made an order, subject to a case for the opinion of the High Court:—

Held, that the terms of the section did not prevent the King's Bench Division from entertaining and dealing with the case.

Westminster Corporation v. *Gordon Hotels, Ld.*, [1907] 1 K. B. 910, distinguished.

Appeal from the order of a Divisional Court (Lord Alverstone C.J., Darling J., and Phillimore J.) directing that a special case stated by the Recorder of Liverpool on an application to him under s. 11 of the Police Act, 1890, should be struck out of the Crown paper and the appeal from him dismissed.

One Kydd, who had been a police constable in the city of Liverpool police force, had claimed a pension under s. 11 of the above-mentioned Act, and, being dissatisfied with the decision of the Watch Committee of Liverpool as to the amount of pension to be allowed to him, had appealed to the recorder sitting in quarter sessions under the section. The recorder, upon the hearing of the appeal, decided in favour of the appellant Kydd upon the question thereby raised, but stated his decision in the form of a special case. Upon the special case coming on for argument in the Divisional Court, the preliminary objection was taken on behalf of the appellant Kydd that, by the terms of s. 11 of the Police Act, 1890, the decision of the quarter sessions was made final, and there was therefore no jurisdiction to hear the special case. The Divisional Court held that they were bound by the decision of the Court of Appeal in *Westminster*

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Corporation v. *Gordon Hotels, Ld.* (1) to hold that they had no jurisdiction, and they consequently ordered the case to be struck out of the Crown paper. (2)

Avory, K.C., and *Rigby Swift*, for the Watch Committee of Liverpool. The Divisional Court were wrong in supposing that this case was governed by the decision of the Court of Appeal in *Westminster Corporation* v. *Gordon Hotels, Ld.* (1) There the case was stated by a magistrate under the Summary Jurisdiction Act, 1879, s. 33, and it was held that s. 33, sub-s. 2, of the Public Health (London) Act, 1891, which contains a provision that the order of a petty sessional Court shall be final in a matter coming within that sub-section, deprived the Court of jurisdiction to hear the case. But there is no analogy for the present purpose between a case stated by a Court of summary jurisdiction under the Summary Jurisdiction Act, 1879, and a case stated by quarter sessions. Where a case is stated by a Court of summary jurisdiction, the proceeding is in the nature of an appeal against the final decision of that Court previously given. Where a case is stated by quarter sessions, there is no decision by the quarter sessions which becomes finally effective until the decision of the High Court has been given in the case. The nature and origin of the procedure by which a case is stated by quarter sessions are fully set forth in the judgment of Field J. in *Reg.* v. *Chantrell* (3), and that of Cockburn C.J. in *Reg.* v. *Walsall Overseers.* (4)

(1) [1907] 1 K. B. 910.

(2) The Police Act, 1890, s. 11, provides (inter alia) that, where a constable claims a pension or allowance under the Act as of right, and the police authority do not admit the claim, the constable "may apply to the police authority for a reconsideration of the claim to the pension or allowance, and if aggrieved by the decision upon such reconsideration may apply to the next practicable Court of quarter sessions for the county within which the constable last served; or if the constable last served in the police force of a borough having a separate police force and a separate Court of quarter sessions, then to the next practicable Court of quarter sessions for that borough; and that Court, after inquiry into the case, may make such order in the matter as appears to the Court just, which order shall be final; but nothing in this section shall confer a right to appeal against the exercise of any discretion, or against any decision which is declared by this Act to be final."

(3) (1875) L. R. 10 Q. B. 587.

(4) (1878) 3 Q. B. D. 457.

The procedure arose out of the old practice by which the justices in quarter sessions consulted a judge of assize in questions of difficulty which came before them. That practice having been found inconvenient, the more modern practice grew up by which the sessions gave their decision subject to a case stated by them for the opinion of the superior Court. The legal grounds of their decision thus being made to appear on the face of the proceedings, the case was brought up by means of a writ of certiorari, and the Court of Queen's Bench, if they thought the decision as given erroneous in point of law, had jurisdiction to quash the order of sessions; but, until the decision of the superior Court was given on the special case, the decision of the quarter sessions was in effect a merely conditional decision. Whatever the modern form of the procedure may be, in substance it is an exercise of the old power inherent in the Court of quarter sessions to consult the superior Court as to what its decision ought to be. It is entirely in the discretion of the quarter sessions whether they will state a case, and they cannot be compelled to do so at the instance of the parties. It cannot have been intended by s. 11 of the Police Act, 1890, to exclude the inherent power of the quarter sessions to consult the superior Court before giving a decision which would finally become effective.

In the case of *Reg.* v. *Walsall Overseers* (1) the section giving the appeal to quarter sessions provided that the sessions should "finally determine" the matter, but it was not suggested in that case by any of the judges, nor on the appeal to the House of Lords (see *Walsall Overseers* v. *London and North Western Ry. Co.* (2)), that there was no jurisdiction in the Queen's Bench Division to entertain the case, the only question being whether there was an appeal from the Queen's Bench Division. In *Goodwin* v. *Sheffield Corporation* (3) the Divisional Court held, upon the same section of the Police Act, 1890, that they had jurisdiction to entertain a case stated by quarter sessions. In *Upperton* v. *Ridley* (4) and in *Garbutt* v. *Durham Joint*

(1) 3 Q. B. D. 457.
(2) (1878) 4 App. Cas. 30.
(3) [1902] 1 K. B. 629.
(4) [1900] 1 Q. B. 680; [1901] 1 K. B. 384; [1903] A. C. 281.

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Committee (1) appeals from decisions of divisional Courts on cases stated by quarter sessions on appeals under s. 11 of the Police Act, 1890, were decided by the Court of Appeal, and ultimately by the House of Lords. It is true that the point that there was no jurisdiction was not argued in those cases, but it must have been assumed that there was jurisdiction. [They also cited *Reg.* v. *Bridge.* (2)]

Leslie Scott, for the appellant at quarter sessions, Kydd. The point now raised was never argued in *Upperton* v. *Ridley* (3) or in *Garbutt* v. *Durham Joint Committee* (1), and therefore those cases cannot be taken as amounting to decisions upon that point. The intention expressed in the plainest terms in s. 11 of the Police Act, 1890, is that the right of a police constable in the matter of a pension should be finally determined by the decision of the quarter sessions, and that it should not be possible to make it the subject of a protracted litigation ending in the House of Lords. Such a provision is most reasonable, having regard to the nature of the subject-matter, and the fact that one of the parties to the dispute is a person not likely to be able to afford the expense of conducting such a litigation against a body like a great municipal corporation. Whatever in point of form the procedure may be, by which a decision of the quarter sessions is made subject to review by the King's Bench Division, and whatever its historical origin, it is in point of substance an appeal against the decision of the quarter sessions on a point of law, just as much as the procedure on a case stated by a Court of summary jurisdiction is an appeal against the decision of that Court on a point of law; and it is submitted that, looking to the intention plainly shewn by s. 11 of the Police Act, 1890, the effect of that section in both cases must be the same. The intention was that there should be no further step in the litigation after the hearing of the appeal by the quarter sessions. Formerly a case stated by quarter sessions had to be brought up by writ of certiorari, and that writ proceeded on the footing that there had been a final order of the

(1) [1904] 1 K. B. 522; [1904] 2 K. B. 514; [1906] A. C. 291.
(2) (1890) 24 Q. B. D. 609.
(3) [1900] 1 Q. B. 680; [1901] 1 K. B. 384; [1903] A. C. 281.

sessions which, on the face of it, was erroneous in point of law. There are many decisions which shew that the Court of King's Bench would only hear a case where the quarter sessions had made an order which, if unreversed, would finally determine the appeal: see *Reg.* v. *London and North Western Ry. Co.* (1); *Reg.* v. *Kesteven* (2); *Reg.* v. *Marton-cum-Grafton* (3); *Reg.* v. *West Houghton* (4); *Reg.* v. *Stoke-upon-Trent.* (5) The Summary Jurisdiction Act, 1879, s. 40, did away with the necessity for a certiorari in order to bring up the case, but that is mere matter of procedure, and cannot substantially alter the nature of the jurisdiction exercised by the King's Bench Division in such cases, which is in substance essentially appellate. It is impossible to suggest, since *Walsall Overseers* v. *London and North Western Ry. Co.* (6), that the jurisdiction of the King's Bench Division in regard to cases stated from quarter sessions is merely advisory or consultative. In the Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16, s. 2), it is provided that every case stated by a Court of quarter sessions, otherwise than under 11 & 12 Vict. c. 78 and 12 & 13 Vict. c. 45, for the consideration of the High Court shall be deemed to be an appeal, and shall be heard and determined accordingly. If the construction contended for by the watch committee is adopted, no effect is really given to the words "which order shall be final" in s. 11 of the Police Act, 1890. [He also cited *Rex* v. *Cottingham* (7); *Reg.* v. *Napton Overseers.* (8)]

Avory, K.C., in reply.

Cur. adv. vult.

June 20. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal from the decision of the King's Bench Division ordering a special case to be struck out of the Crown paper, and this appeal dismissed, on the ground that the Court had no jurisdiction to entertain the same. Lord Alverstone C.J., in giving judgment, based his decision on the decision of the

(1) (1874) 43 L. J. (M.C.) 57.
(2) (1844) 3 Q. B. 810.
(3) (1847) 10 Q. B. 971.
(4) (1843) 13 L. J. (M.C.) 41.
(5) (1843) 13 L. J. (M.C.) 41.
(6) 4 App. Cas. 30.
(7) (1834) 2 A. & E. 250.
(8) (1856) 25 L. J. (Q.B.) 296.

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Court of Appeal in *Westminster Corporation* v. *Gordon Hotels, Ld.* (1), and said: "Now, when this Police Act is regarded, it seems to me that in any event the recorder or the quarter sessions was intended to be the final judge of fact and of law. That undoubtedly is the effect of the section. I thought at the time of the Sheffield case"—*Goodwin* v. *Sheffield Corporation* (2)—"that, notwithstanding that view, if the recorder had stated a case on appeal for the opinion of the Court, the judgment might be taken to be a judgment which was not finally pronounced, until that case had been determined, or, in other words, that the judgment of the recorder was a judgment which would be entered in accordance with the view taken by the Court to which the decision went on the case as so stated. But that view has not commended itself to the Court of Appeal, because in the Metropolis Management Act, which was under consideration in the Gordon Hotel case"—*Westminster Corporation* v. *Gordon Hotels, Ld.* (1)—"exactly the same point was raised, and there the magistrate had stated a special case. Therefore the argument which had weight with me, when I decided against the preliminary objection in the Goodwin case"—*Goodwin* v. *Sheffield Corporation* (2)—"seems to me to be cut away, whatever might be my own view, and I feel absolutely bound by the view taken by the Court of Appeal that I must hold that in this case there can be no appeal from the recorder's decision. If I could have seen that there was some matter which was raised, which was not, so to speak, merely by way of appeal from the recorder, possibly some different view might be taken, but, looking at the substance of the questions raised, I am satisfied that they are matters of appeal from the recorder, either as regards the facts, or as regards the view of the law as applied to the facts. For this reason I think I am bound by the decision of the Court of Appeal, and I think we must refuse to allow this appeal to be argued." It is plain that neither the Lord Chief Justice nor Phillimore J. drew any distinction between an appeal on a case stated from quarter sessions by the recorder and a case stated by a magistrate. Darling J. says: "Seeing what is the form in which this matter comes before us, I agree with the judgment

(1) [1907] 1 K. B. 910. (2) [1902] 1 K. B. 629.

that my Lord has given." I suppose that this means that he might have given a different judgment if the case had been brought up on a certiorari. It is not necessary for us to consider this. We have only to consider the arguments urged against the reasoning of Lord Alverstone C.J. and Darling J.

Mr. Avory urged that the case of *Westminster Corporation* v. *Gordon Hotels, Ld.* (1) does not really affect this case, and in no sense bound the King's Bench Division to come to the decision which they did. In that case the case was stated by a magistrate, and not by quarter sessions. In the case of a magistrate, up to the passing in 1857 of the "Act to improve the administration of the law so far as respects summary proceedings before justices," which is to be read with s. 33 of the Summary Jurisdiction Act, 1879, there was no provision whatever in the nature of appeal by case stated from a decision by the magistrate. There was a proceeding by certiorari, but there was no proceeding in the nature of a case stated; and s. 33 of the latter Act expressly provides that anyone aggrieved by an order of a Court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the Court to state a special case, setting forth the facts of the case, and the ground on which the proceeding is questioned, and, if the Court decline to state the case, may apply to the High Court of Justice for an order requiring the case to be stated. It was under the provisions of this section that Fry L.J. and Mathew J. held in *Reg.* v. *Bridge* (2) that the magistrate was bound to state a case, notwithstanding the provision in s. 129 of the Metropolis Management Act, 1855, that the decision of the magistrate should be final and conclusive. We decided in *Westminster Corporation* v. *Gordon Hotels, Ld.* (1) that the effect of s. 33, sub-s. 2, of the Public Health (London) Act, 1891, was to restore for the purposes of that Act the state of things existing prior to the decision in *Reg.* v. *Bridge* (2)—that is to say, we decided that under that Act the decision of a magistrate was final and without appeal. But I do not think that that case governs the present case, which is a case in which the quarter sessions, through the recorder, have stated a case.

(1) [1907] 1 K. B. 910. (2) 24 Q. B. D. 609.

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A case stated by quarter sessions is wholly different from a case stated by a magistrate under the Summary Jurisdiction Act, 1879, which Act gave for the first time an appeal from a magistrate by the statement of a case by the magistrate, who could be compelled by mandamus to state a case.

In the case of *Reg.* v. *Chantrell* (1) the certiorari was for the purpose of bringing up to quash an order of the justices of Sussex in quarter sessions, whereby they conditionally affirmed a conviction of the appellant under the Prevention of Cruelty to Animals Act (12 & 13 Vict. c. 92), subject to a case for the opinion of the Court. The writ of certiorari was issued for the purpose of bringing that case before the Court. The objection to it was that such a writ was absolutely prohibited by s. 26 of the Act, and could not issue even for that purpose, and the Court felt themselves bound to yield to that objection. Sect. 26 of that Act provides that no conviction, nor any order, judgment, or proceeding relative thereto, shall be quashed for want of form, or be removed by writ of certiorari or otherwise into any of Her Majesty's superior Courts of record.

The Summary Jurisdiction Act, 1879, s. 40, dispenses with the certiorari, but, as a case can be stated by quarter sessions for the opinion of the Court for the purpose of appeal, the case of *Reg.* v. *Chantrell* (1), and the other cases decided when a certiorari was necessary for the purpose of bringing up a case stated by the sessions, are still relevant for the purpose of deciding whether or not a case has been so stated that the King's Bench Division, as a superior Court, ought to make an order or give judgment upon it. It is important to observe that in the case of *Reg.* v. *Dickenson* (2) it was held that, although under the statute there in question the writ of certiorari was taken away, yet that by virtue of the consent of the parties the Court might receive the case and determine the question.

In *Upperton* v. *Ridley* (3) in the Queen's Bench Division, which was an appeal from the decision of quarter sessions, who dismissed an appeal to them under s. 11 of the Police Act, 1890, Mr. Macmorran at the commencement of his argument as reported

(1) L. R. 10 Q. B. 587.
(2) (1857) 7 E. & B. 831.
(3) [1900] 1 Q. B. 680; [1901] 1 K. B. 384; [1903] A. C. 281.

in the *Law Times* (1) said: "Sect. 11 says that the decision of the quarter sessions is final. Whether there is an appeal or not to this Court is a matter which we pass over, as we wish to have a decision on the points raised"; and the House of Lords dealt with the case without any question being raised as to the effect of the word "final" in s. 11.

In the case of *Garbutt* v. *Durham Joint Committee* (2), which again was an appeal from quarter sessions acting under the powers of s. 11 of the Police Act, 1890, the House of Lords had before it the decision of the Court of Appeal affirming the decision of the King's Bench Division, and no question was raised by the Lord Chancellor and the other Lords (Lord Macnaghten, Lord Davey, Lord James, Lord Robertson, and Lord Atkinson) as to the finality of the decision of quarter sessions. Neither was the point raised by counsel, although there is no trace of any statement that the question whether or not there is an appeal from quarter sessions to the King's Bench Division, or whether the decision of quarter sessions is final, was a question expressly stated to the Court by the consent of both sides to be a question not intended to be raised, as all parties wished to have the decision of the Court upon the questions raised by the special case. It is difficult to suppose that the House of Lords passed over the question of finality of the decision of quarter sessions per incuriam; and it is difficult to understand how a question of jurisdiction could be disposed of by the agreement or consent of parties, after the function of the superior Court had ceased to be consultative, which was the case in *Upperton* v. *Ridley* (3); although the consent of counsel might well enable the superior Court, by consent, to give an opinion on a special case, even in a proceeding in which the certiorari was taken away by statute, supposing the case in fact to be before them and the function of the Court to be merely consultative, as was the case in *Reg.* v. *Dickenson.* (4)

Under these circumstances I have come to the conclusion that we ought to hold that the House of Lords in the case of *Garbutt*

(1) 82 L. T. 233.
(2) [1904] 1 K. B. 522; [1904] 2 K. B. 514; [1906] A. C. 291.
(3) [1900] 1 Q. B. 680; [1901] 1 K. B. 384; [1903] A. C. 281.
(4) 7 E. & B. 831.

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v. *Durham Joint Committee* (1) decided the case on the basis that the King's Bench Division had jurisdiction to deal with an appeal from quarter sessions under s. 11 of the Police Act, 1890, notwithstanding the words, "that Court" (i.e., the Court of quarter sessions), "after inquiry into the case, may make such order in the matter as appears to the Court to be just, which order shall be final"; and ought so to hold, even though the point does not seem to have been discussed from the report in the House of Lords. So, too, in *Upperton* v. *Ridley* (2) I think that the Queen's Bench Division must be taken to have been satisfied that there was an appeal from quarter sessions to the Queen's Bench Division under s. 11 of the Police Act, 1890, and not to have relied on the fact simply that the parties by consent did not raise the point; and in the same way the House of Lords must have satisfied themselves as to these words not excluding an appeal to the Queen's Bench Division.

The decision of the King's Bench Division in *Goodwin* v. *Sheffield Corporation* (3), in which Lord Alverstone C.J. and his colleagues held with regard to the same preliminary objection as is made in this case that s. 11 was not intended to deprive a party of his right to have a case stated on a question of law, comes just before the decision of the House of Lords in *Upperton* v. *Ridley* (2) and the decision of that House in *Garbutt* v. *Durham Joint Committee.* (1)

Lord Alverstone C.J. by his judgment in the present case says that in the present case he would have decided against the preliminary objection on the authority of the case of *Goodwin* v. *Sheffield Corporation* (3) had he not thought that the principle on which he decided that case was cut away by the decision of the Court of Appeal in *Westminster Corporation* v. *Gordon Hotels, Ld.* (4) But for reasons which I will presently give I do not think that that case affects the point which we have to decide to-day. That case was a decision as to how far power of appeal given by the Summary Jurisdiction Act, 1879, was affected by the particular legislation contained in s. 33, sub-s. 2, of the

(1) [1904] 1 K. B. 522; [1904] 2 K. B. 384; [1903] A. C. 281.
(2) [1900] 1 Q. B. 680; [1901] 1 K. B. 514; [1906] A. C. 291.
(3) [1902] 1 K. B. 629.
(4) [1907] 1 K. B. 910.

Public Health (London) Act, 1891; whereas in the present case, as in *Goodwin* v. *Sheffield Corporation* (1), the decision is that s. 11 of the Police Act, 1890, does not deprive a party affected by the decision of quarter sessions of his right to have a case stated upon a question of law.

The result of these considerations in my opinion is that we must allow this appeal and reverse the decision of the King's Bench Division and send back this special case to that Court to be dealt with on its merits.

I should like to say, however, as I am not quite sure whether the House of Lords did intend to decide this point, that, independently of those decisions in the House of Lords, I should have been disposed to come to the conclusion that the preliminary objection was good on the ground that the words "may make such order in the matter as appears to the Court just, which order shall be final," were intended by the Legislature to exclude any appeal from the order of quarter sessions. In a departmental matter such as police pensions it seems not unnatural that the Legislature should limit the appeals, especially having regard to the fact that policemen claiming police pensions are hardly likely to be wealthy enough to bear the cost of a series of appeals.

I only wish to add one word upon the argument that was a good deal pressed upon us that, notwithstanding the decision to which I have called attention, the jurisdiction exercised by the King's Bench Division remains to a certain extent consultative. I think it is impossible to support that argument after the judgment of Lord Cairns in the House of Lords in the case of *Walsall Overseers* v. *London and North Western Ry. Co.* (2) The passage in Lord Cairns' judgment to which I refer is as follows: "If the Court of quarter sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became upon the face of it a speaking order; and, if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the Court of Queen's Bench and point

(1) [1902] 1 K. B. 629. (2) 4 App. Cas. 30, at p. 40.

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to the order as one which told its own story, and ask the Court of Queen's Bench to remove it by certiorari, and when so removed to pass judgment upon it, whether it should or should not be quashed. In that case, as I said just now, the jurisdiction of the Court of Queen's Bench was merely a jurisdiction to leave the order standing or to remove it out of the way. It was not a jurisdiction to substitute for it another or a different order; that would be making the Court of Queen's Bench, in the ordinary sense of the term, a Court of re-hearing or of appeal. Now, if that is the jurisdiction of the Court of Queen's Bench, it is not a jurisdiction which in any respect can be called a consultative jurisdiction; it is a jurisdiction of the Court of Queen's Bench as a Court higher than the Court of quarter sessions to overthrow and destroy an act of the Court of quarter sessions and to remove it out of the way." Then he adds later on (1): "The circumstance, that there were appended to the special case the series of questions to which I have referred, could not in any way destroy that right of the suitor, if he was otherwise entitled to an order quashing the order of the Court of quarter sessions."

FLETCHER MOULTON L.J. read the following judgment:—In this case a Divisional Court of the King's Bench Division has refused to consider or adjudicate upon a special case stated by the Recorder of Liverpool upon a matter coming before him under the provisions of s. 11 of the Police Act, 1890. The ground of this refusal was that they had no jurisdiction to hear a special case under that section, because the order of the recorder was made final by the section itself, and the Court considered that it was bound by the decision of the Court of Appeal in *Westminster Corporation* v. *Gordon Hotels, Ld.* (2) to hold that, in face of such a provision, it had no jurisdiction in the matter. For reasons which I shall presently give, I am of opinion that the decision of the Court of Appeal in the case of *Westminster Corporation* v. *Gordon Hotels, Ld.* (2) has no bearing on the point, and, although, if the matter were res integra, I should be greatly tempted to agree with the Divisional Court in their view as to the absence of jurisdiction,

(1) 4 App. Cas. 30, at p. 42. (2) [1907] 1 K. B. 910.

yet, as the cases stand, I am of opinion that we must hold that there was jurisdiction to hear the special case, and that the preliminary objection raised by the respondent should have been overruled.

To understand the question at issue it is necessary to go back to the procedure which existed prior to 1879 under which Courts of quarter sessions (including, of course, such a Court as that of the Recorder of Liverpool) used to give their decisions, when they desired so to do, in the form of a special case for the opinion of the superior Courts. The nature and origin of this procedure have been authoritatively settled by the Queen's Bench Division in the case of *Reg.* v. *Chantrell* (1), decided in 1875, and by the House of Lords in *Walsall Overseers* v. *London and North Western Ry. Co.* (2), decided in 1878. These decisions shew clearly that the procedure was not in the nature of an appeal, although in effect it was analogous thereto. The Court of quarter sessions in such cases chose to embody the material and grounds of its decision in the decision itself. Any error in law in the decision became thereby an error on the face of the record, and therefore cognizable by the superior Courts, should the record be brought up before them by the ordinary writ of certiorari. It was not as a Court of appeal that the superior Court sat when considering such special cases: it sat in the exercise of its ordinary jurisdiction to quash decisions of inferior Courts, when those decisions were on the face of them bad in law. Thus it was that a writ of certiorari was always necessary to bring up such special cases, and this also accounts for the numerous decisions of the Courts to the effect that provisions in statutes that the decision of the inferior Court should be final did not operate as a bar to such a procedure. Not being in its nature an appeal, it was applicable even when the decision of the inferior Court was expressly made final. Nothing but words taking away the power to review by certiorari was effective to prevent the procedure being adopted.

In the year 1879 the Summary Jurisdiction Act was passed. Sect. 40 provides as follows: "A writ of certiorari or other writ shall not be required for the removal of any conviction

(1) L. R. 10 Q. B. 587. (2) 4 App. Cas. 30.

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order or other determination in relation to which a special case is stated by a Court of general or quarter sessions for obtaining the judgment or determination of a superior Court." This provision left the procedure by way of special case one which is hardly distinguishable in form or substance from an appeal. But I cannot bring myself to believe that it thereby took away the power to state a special case in cases where it previously existed, or even in cases under subsequent Acts where language was used which the Courts had previously held to be no bar to stating a special case. The sole object of the section is obviously to shorten and simplify the old procedure by omitting the formal writ which had up to that time been necessary. In my opinion it did nothing more, and the fact that in a statute passed between 1879 and 1894 the decision of the Court of quarter sessions was statutably made final upon a particular matter would, in my opinion, have no greater effect in creating a bar to the procedure by special case than it had before.

But the Summary Jurisdiction Act, 1879, made a most important change in the procedure applicable to Courts of summary jurisdiction. By s. 33 it extended the procedure introduced by the Summary Jurisdiction Act, 1857, and gave a general right to a person aggrieved who desired to question the decision of such a Court on grounds of law or jurisdiction to apply to the Court to state a special case setting forth the facts, and to apply to a superior Court to hear and determine the questions of law thus raised. This procedure, it will be observed, was from its very inception of the nature of an appeal. The special case came after the decision of the Court, and the function of the superior Court was to review that decision. This accounts for the decision of the Court of Appeal in *Westminster Corporation* v. *Gordon Hotels, Ld.* (1) (which was a case stated by a Court of summary jurisdiction under s. 33 of the Act of 1879), to the effect that the procedure was barred by a statutory provision that the decision of the magistrate should be final. But this decision does not touch the question now before us, which relates to the older and radically different procedure relating to Courts of quarter sessions, which had not

(1) [1907] 1 K. B. 910.

as yet lost its ancient and peculiar character or become an appeal.

The Police Act was passed in 1890, when matters stood in this position. As I have already said, I am of the opinion that the procedure of stating a case by quarter sessions must at that date be regarded as unchanged in nature, and as an application of the old procedure of certiorari, although no formal writ was any longer required. Accordingly I hold that the provision in s. 11 that the order of the Court of quarter sessions should be final does not prevent recourse to this procedure.

By the Supreme Court of Judicature (Procedure) Act, 1894, s. 2, all such cases stated by quarter sessions are to be deemed appeals in future. Once again I cannot bring myself to think that an Act relating purely to procedure was intended to affect substantial existing rights, and therefore I do not think that the provisions of this Act have the effect of taking away the power of quarter sessions to state a special case where it previously existed. So far, therefore, as concerns proceedings under Acts of earlier date, I am of opinion that, where the superior Court could have brought the case before it by certiorari, and (if the Court of quarter sessions had seen fit to state their decision in the form of a special case, or, as it was usually phrased, "subject to a special case") could review the correctness of that decision, the High Court has still the power of review even though a writ of certiorari is no longer needed as a preliminary to that hearing.

The present case is under s. 11 of the Police Act, 1890. Under that section there is an appeal to the quarter sessions as to the amount of a constable's pension, and it is provided that on such appeal the Court of quarter sessions "may make such order in the matter as appears to the Court just, which order shall be final." I think it not improbable that the actual intention of the Legislature was that the Court of quarter sessions should by their decision finally settle the matter in order to prevent prolonged litigation on the questions which would arise under the section, and that it was not intended that, even when they desired it, their decision should be reviewed, either through the medium of a certiorari, or otherwise. But, having regard to the scope of the powers of the Court to act by

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certiorari previously to 1879 and to the conclusion to which I have come as to the effect of s. 40 of the Summary Jurisdiction Act, 1879, I cannot consider that the words are strong enough to prevent the Court of quarter sessions from stating a special case, or to relieve the King's Bench Division from the duty of considering it. But I am by no means certain that I should have come to the same conclusion had the Police Act been subsequent in date to the Supreme Court of Judicature (Procedure) Act, 1894, by which it is provided that these proceedings by special case are to be deemed appeals. The use of the word "final" as to a decision of an inferior Court in a subsequent statute may well be held to preclude a procedure which, however it may have arisen, is now by statute to be deemed an appeal.

The point is, however, one upon which I should have felt great difficulty, were it not that I find that this Court and the House of Lords have entertained and heard two appeals from decisions of the King's Bench Division under this very section of the Police Act, namely, *Upperton* v. *Ridley* (1) and *Garbutt* v. *Durham Joint Committee*. (2) It is true that in neither of these cases was the question of jurisdiction argued, which is the point now before us. But, as it arises from the language of the very section which the Courts were considering in these two cases, I cannot believe that it would not have occurred to some member of the Courts, and, as it goes to jurisdiction, it is clear that it is an objection which the Court itself would be entitled, and indeed bound, to take. We must therefore assume that in these cases the Court of Appeal and the House of Lords considered that it had jurisdiction to decide the point raised, and therefore that the original consideration by the King's Bench Division was within its jurisdiction. For the reasons I have given this may be supported on the provisions of the statutes that relate to the matter, but, apart from those grounds, I am of opinion that we are bound by these two cases to hold that there is jurisdiction in the King's Bench Division to hear appeals by special case from quarter sessions under s. 11 of the Police Act, 1890.

I wish, however, to add that this decision applies solely to the

(1) [1900] 1 Q. B. 680; [1901] 1 K. B. 384; [1903] A. C. 281.

(2) [1904] 1 K. B. 522; [1904] 2 K. B. 514; [1906] A. C. 291.

preliminary objection to the hearing by the King's Bench Division, which alone is the subject of the present appeal. I am by no means deciding that the King's Bench Division might not, in accordance with the old-established practice of the Court, refuse to hear this particular special case on the ground that the form in which it is stated renders it unfit to be heard by them. The Court of King's Bench in olden times usually refused to deal with special cases which were stated in a form not suited to the procedure of certiorari, where the judgment of the Court must be either to quash or to refuse to quash the order of the quarter sessions. But that is a matter which does not relate to the preliminary objection, and will be considered, no doubt, by the King's Bench Division when they hear the special case.

BUCKLEY L.J. read the following judgment:—The question for decision here is whether the effect of the word "final" in s. 11 of the Police Act, 1890, is to exclude the power inherent in a Court of quarter sessions to state a case for a superior Court. Even if I held an opinion contrary to that which I in fact hold, I should be of opinion that in this Court the affirmative of that proposition could not be sustained, whatever might be the result in the House of Lords. In two cases arising under s. 11 of the Police Act, 1890, a case having been stated by quarter sessions, the matter has been argued up to, and including, the House of Lords. It is true that neither in the Court of Appeal nor in the House of Lords does it appear that the question now argued before us was argued or in so many words determined. But, at the same time, the House of Lords would have had no jurisdiction if the proposition were true. It would not be respectful in this Court, even if it be technically open to this Court, to assume that a question which arises upon the very section upon which the House was adjudicating was not present to their Lordships' minds. The two cases to which I refer are *Upperton* v. *Ridley* (1) and *Garbutt* v. *Durham Joint Committee*. (2) Moreover, in *Upperton* v. *Ridley* (3) in the Divisional Court the report

(1) [1900] 1 Q. B. 680; [1901] 1 K. B. 384; [1903] A. C. 281.

(2) [1904] 1 K. B. 522; [1904] 2 K. B. 514; [1906] A. C. 291.

(3) [1900] 1 Q. B. 680; 82 L. T. 233.

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shews that the respondent's counsel at the opening of his argument stated that it was matter of doubt whether there was any power in the quarter sessions to state a case, but added that he did not desire to raise the point. We ought not to assume that the learned Lords overlooked a point thus expressly pointed to in the report of the case which was under appeal before them. Further, during the progress of *Upperton* v. *Ridley* (1) to the House of Lords—namely, in March, 1902—in *Goodwin* v. *Sheffield Corporation* (2) the question had been argued, and the Divisional Court had held that a case might be stated under this s. 11 of the Police Act, 1890, and it was in that state of facts that the House of Lords acted upon the footing that it had jurisdiction in deciding the two cases I have mentioned in the years 1903 and 1906. There is a third case not under the same Act, but involving similar considerations, which again went to the House of Lords, that is, *Reg.* v. *Walsall Overseers.* (3) The relevant words there were those in the 17 Geo. 2, c. 38, s. 4, by which the quarter sessions were authorized and required to receive such appeal and to hear and finally determine the same. The exact point before us was again, I agree, not the point for decision there, but the case proceeded upon the footing that, notwithstanding the words as to final determination, there was a power in the Court of quarter sessions to state a case, the decision being that upon such a case there was a right of appeal from the Divisional Court.

In case the present case may go further I add the reasons for which I hold that there was here a power in the Court of quarter sessions to state a case. The historical origin of case stated by quarter sessions is traced in the judgment of Field J. in *Reg.* v. *Chantrell.* (4) The short substance of it is that the Court of quarter sessions is a judicial authority so constituted as that it may call to its aid a superior Court to assist the inferior Court in making its order. The order of the inferior Court is, in the language of the Police Act, 1890, "final," but the inferior Court is a Court so constituted as that its order

(1) [1900] 1 Q. B. 680; [1901] 1 K. B. 384; [1903] A. C. 281.

(2) [1902] 1 K. B. 629.

(3) 3 Q. B. D. 457; 4 App. Cas. 30.

(4) L. R. 10 Q. B. 587.

may, if the inferior Court thinks fit to state a case, be moulded by the decision of a superior Court. The proceeding in the superior Court is not an appeal, notwithstanding the fact that the order will be, or may be, ultimately governed by the result of the proceedings in the superior Court. The parties have no right of appeal. The question, as Field J. said in *Reg.* v. *Chantrell* (1), whether a case is one of difficulty or not fit to be reserved for the Court is to be determined by the sessions, and not by the parties. Again, Cockburn C.J., in *Reg.* v. *Walsall Overseers* (2), said that nothing can be better settled than that it is entirely at the discretion of the sessions whether to grant a case and so to submit their judgment to the opinion of the Court of Queen's Bench or not. Even though the matter should be one in which, in the proper exercise of their discretion, they ought undoubtedly to grant a case in order that their judgment may be reviewed, if they refuse to do so, there are no means of compelling them. The position, therefore, is one in which the Court of inferior jurisdiction whose order is to be final is master of the situation throughout, and, if resort is had to the superior Court, it is not in exercise of any right of the litigants, but pursuant to a power inherent in the inferior Court to state a case for the superior Court for its own guidance in arriving at the order which is to be final.

The order of the quarter sessions here is that the applicant is entitled to a certain pension, subject, nevertheless, to a case to be stated for the opinion of the King's Bench Division. Whether the case which has been stated is in such a form as that the King's Bench Division can properly deal with it I do not say. I express no opinion at all to the effect that it is not. On the contrary, having read it, I think that the point for decision is very plain, but with this for the present, in my judgment, we have nothing to do. The Court of King's Bench have ordered the special case to be struck out of the paper, and the appeal dismissed, on the ground that that Court has no jurisdiction. In this I think they were wrong. The notice of appeal before us asks that that order be rescinded and that the

(1) L. R. 10 Q. B. 587. (2) 3 Q. B. D. 457, at p. 473.

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question of law reserved by the case for the opinion of the King's Bench Division may be determined by that Court. The only question upon which the parties have come to the Court of Appeal is whether the King's Bench Division ought to hear the case. In my opinion they ought. The proper order, I think, will be to discharge the order below and send the case for hearing to the King's Bench Division.

It is plain from the judgment of the Lord Chief Justice that he would have been of the opinion which I have expressed had he not thought he was bound to decide the contrary by the recent decision of this Court in *Westminster Corporation* v. *Gordon Hotels, Ld.* (1) That case has not, I think, any bearing upon the point now before us. The question there was not of case stated by quarter sessions, but of case stated by a Court of summary jurisdiction. The point there was that before 1879 there was in such a matter as was there in question no procedure by which a Court of summary jurisdiction could state a case. The Summary Jurisdiction Act, 1879, s. 33, had given a person aggrieved the right to require the magistrate to state a case. The subsequent Act of 1891, on which the question arose, provided that the decision of the inferior Court should be final. What we held was that the Act of 1891 thus excluded the Act of 1879. The points of difference, therefore, were saliently two: first, that that case came under different Acts of Parliament and a different course of procedure; and, secondly, that, if the decision had been the other way, the result there would have been, not that the magistrate might have asked the assistance of a superior Court, which is the case with quarter sessions, but that the party aggrieved could have required him to state a case—that is to say, that the party could, so to speak, have appealed. In giving judgment in that case I expressed a hope that even a Court of summary jurisdiction might, by putting its order in a proper form, obtain the assistance of a superior Court. Mr. Avory says that I went too far when I added an expression of opinion that that could be done. That may be so, but I venture to repeat my hope, and, when the point comes for decision, I will reconsider

(1) [1907] 1 K. B. 910.

whether my expression of opinion, which was but obiter dictum, was justified.

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Appeal allowed.

Solicitors for appellants: *F. Venn & Co., for Pickmere, Liverpool.*

Solicitors for respondent: *Pritchard, Englefield & Co., for Brighouse, Ryland & Co., Liverpool.*

E. L.

HARROGATE CORPORATION *v.* MACKAY.

1907

June 20.

Water—Supply for Domestic Purposes—Water for Motor Car used for Profession of Physician and Surgeon—Waterworks Clauses Act, 1863 (26 & 27 *Vict.* c. 93), *s.* 12.

Water supplied to and used by a medical man for washing a motor car and for other purposes in connection therewith, the motor car being used by him for the purposes of his profession or business of a physician and surgeon, is water supplied for domestic purposes within the meaning of s. 12 of the Waterworks Clauses Act, 1863.

CASE stated by justices for the West Riding of Yorkshire.

At a Court of summary jurisdiction sitting at the Court-house, Knaresborough, a complaint was preferred by the mayor, aldermen, and burgesses of the borough of Harrogate (hereinafter called the appellants) under the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), and Acts amending the same, the Public Health Act, 1875 (38 & 39 Vict. c. 55), and the Harrogate Corporation (Waterworks Transfer) Act, 1897 (60 & 61 Vict. c. ccxxxvii.), against Ian Donald Mackay (hereinafter called the respondent) to recover the sum of 10*s.*, being rent for water supplied by the appellants to and used by the respondent for washing a motor car, and for other purposes in connection therewith, the motor car being used by him for the purposes of his profession or business of a physician and surgeon, during the half-year ended December 25, 1906. The complaint was heard on February 27, 1907, when the justices dismissed the same.

At the hearing the following facts were admitted or proved: During the half-year ended December 25, 1906, the respondent

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kept a motor car, which he used in and for the purpose of his business or profession as a medical man, although he used it from time to time for purposes of pleasure. The respondent during the said period regularly used water from the appellants' pipes for the purpose of washing his motor car and for other purposes in connection therewith. The respondent kept his motor car in an outbuilding or premises adjoining his dwelling-house, the rateable value of the whole premises, according to the Poor Law Valuation List, being 39*l.*, and the appellants had charged the respondent and the respondent had paid the appellants the sum of 1*l.* 7*s.* 4*d.*, the water rate for water supplied for domestic purposes to the premises, for the half-year ended December 25, 1906, in accordance with the provisions of s. 26 of the Harrogate Corporation (Waterworks Transfer) Act, 1897. The appellants, purporting to act under s. 34 of the Harrogate Corporation (Waterworks Transfer) Act, 1897, had charged the respondent, in addition to the rate of 1*l.* 7*s.* 4*d.* for water supplied for domestic purposes for the half-year ended December 25, 1906, a rent or sum of 10*s.* for water supplied and used during the same half-year for other than domestic purposes, that is to say for business purposes—namely, for washing his motor car and for other purposes in connection therewith. The appellants had charged the respondent and the respondent had paid the appellants without complaint the like rate and rent for the half-years ended December 25, 1905, and June 24, 1906. The demand note delivered by the appellants to the respondent for the half-year ended December 25, 1906, was worded like the previous demand notes delivered to the respondent for the half-years ended December 25, 1905, and June 24, 1906, and which he had paid without complaint. The respondent did not give any notice that he objected to the charge of rent or to pay such charge for water supplied to him in the way of his business or profession for the purpose of washing his motor car and using water in connection therewith until December 11, 1906, when he informed the appellants' rate collector that he objected to pay the charge. The appellants, in pursuance of s. 34 of the Harrogate Corporation (Waterworks Transfer) Act, 1897, make a charge where water is used for other than domestic purposes, in the

case of a motor car of 1*l.* per annum, in the case of horses 5*s.* each per annum, and in the case of the washing of four-wheeled carriages 7*s.* 6*d.* each per annum, and of two-wheeled carriages 5*s.* each per annum. By the Harrogate Water Act, 1903 (3 Edw. 7, c. xxxvii.), s. 4, the limits of water supply of the appellants were extended to include the whole area comprised in the Knaresborough water supply limits, and it was provided that the appellants should as from the appointed day, September 29, 1903, commence and thereafter continue to afford within the said water limits a supply of water adequate to the needs of the inhabitants thereof, and the provisions contained in the Harrogate Corporation (Waterworks Transfer) Act, 1897, and the Harrogate Water Act, 1901 (1 Edw. 7, c. ccxv.), should apply within the said extended limits of supply. The Harrogate Corporation (Waterworks Transfer) Act, 1897, s. 2, incorporates the provisions of the Waterworks Clauses Act, 1863, and (with certain exceptions not material to this case) the Waterworks Clauses Act, 1847. The Harrogate Corporation (Waterworks Transfer) Act, 1897, s. 34, provides that: "The corporation" (the appellants) "may supply water for other than domestic purposes on such terms and conditions as the corporation think fit and may supply water by measure either for domestic or other purposes and the moneys payable for the supply of water under this section shall be recoverable in the same manner as rates due to the corporation for water Provided always that no person shall be entitled to a supply of water for other than domestic purposes if such supply would interfere with the sufficiency of the supply of water for domestic purposes." Sect. 12 of the Waterworks Clauses Act, 1863, enacts that: "A supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or for washing carriages where such horses or carriages are kept for sale or hire or by a common carrier, or a supply for any trade, manufacture, or business, or for watering gardens, or for fountains, or for any ornamental purpose."

For the appellants it was contended that water used by the respondent for the purpose of washing, &c., his motor car in the manner hereinbefore set out was not used for a domestic purpose; that as the motor car was mainly used by the respondent

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in the practice of his profession, it was used in a business, and that water supplied for use on the motor car was supplied for a business purpose within s. 12 of the Waterworks Clauses Act, 1863; and that the appellants were empowered by virtue of the Harrogate Corporation (Waterworks Transfer) Act, 1897, s. 34, to supply water for other than domestic purposes on such terms and conditions as they (the appellants) think fit; and, further, that the appellants having supplied water to the respondent and charged him a rent therefor, which rent he (the respondent) had paid without complaint for two half-years—that is to say, for the half-year ended December 25, 1905, and for the half-year ended June 24, 1906—there was an implied contract between the appellants and the respondent that if the appellants supplied water to the respondent and he used the water for washing, &c., his motor car for the half-year immediately following the half-year ended June 24, 1906, the respondent would pay the appellants the same rent that had been charged to and paid by him for the two previous half-years ended December 25, 1905, and June 24, 1906. For the respondent it was contended that the supply of water for domestic purposes included the supply of water for a motor car used by the respondent in the practice of his profession of a physician and surgeon; that the Waterworks Clauses Act, 1863, s. 12, applied only to a supply of water for horses or for washing carriages where such horses or carriages are kept for sale or hire or by a common carrier; that the respondent did not keep his motor car for sale or hire, and that he was not a common carrier; that all he (the respondent) wanted water for was for washing his motor car, and he did not want water for a business, and that the water rate charged by the appellants to the respondent for water supplied to him for domestic purposes included the water supplied to and used by him for his motor car.

The justices were of opinion that the water used by the respondent for his motor car was not water used by him for a business within s. 12 of the Waterworks Clauses Act, 1863, and that s. 12 of that Act was an exhaustive one, and did not include water used in the manner in which the respondent used it as hereinbefore set out.

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They were also of opinion that on the facts proved or admitted a contract could not be implied between the appellants and the respondent, that if the respondent used the water for his motor car during the half-year ended December 25, 1906, he would pay the appellants the rent or sum of 10*s.*, which rent or sum he had paid them for the water used for his motor car during the two previous half-years. They accordingly dismissed the complaint.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law.

W. Mackenzie (*Danckwerts, K.C.*, with him), for the appellants. The justices came to a wrong determination. As the motor car is used for the respondent's business purposes, it is not used for domestic purposes. Therefore the water used for washing it cannot be said to be used for "domestic purposes." The object for which water is used must be considered, and in this case that object is the washing of something which is part and parcel of the respondent's stock-in-trade: *Bristol Waterworks Co.* v. *Uren* (1); *Barnard Castle Urban Council* v. *Wilson* (2); *Pidgeon* v. *Great Yarmouth Waterworks Co.* (3); *South-West Suburban Water Co.* v. *St. Marylebone Union* (4); *Chester Waterworks Co.* v. *Chester Union* (5); *Smith* v. *Anderson.* (6) The motor car was used for business and not for pleasure.

Horace Avory, K.C. (*Moresby White* with him), for the respondent, was not called upon.

LORD ALVERSTONE C.J. In 1858 it was decided in *Busby* v. *Chesterfield Waterworks and Gaslight Co.* (7) that water used for washing a carriage kept for private use was used for a domestic purpose. Nearly fifty years have elapsed since that decision, and during the whole of that period medical men have been driving about without being subject to the extra charge now claimed in respect of their carriages, although they are perhaps

(1) (1885) 15 Q. B. D. 637.
(2) [1902] 2 Ch. 746.
(3) [1902] 1 K. B. 310.
(4) [1904] 2 K. B. 174.
(5) (1907) 71 J. P. 133.
(6) (1880) 15 Ch. D. 247.
(7) (1858) E. B. & E. 176.

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used more often than other carriages. Whether their carriages are washed more frequently than are other carriages I do not know, nor do I understand why it should be suggested that a medical man's carriage is not used for domestic purposes when a judge's or a stockbroker's carriage is so used.

In 1863 it was thought desirable, in the interests of the water companies, to impose some limit; and that was done in s. 12 of the Waterworks Clauses Act, 1863. That section was enacted with a knowledge of the decision in *Busby* v. *Chesterfield Waterworks and Gaslight Co.* (1), and it does not mention carriages in which professional men ride, but it provides that "a supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or for washing carriages where such horses or carriages are kept for sale or hire or by a common carrier, or a supply for any trade, manufacture, or business. . . . ."

If it had been intended to alter the effect of the previous decision it would have been done by expressly including in s. 12 of the Act of 1863 some words shewing that where a carriage is used by a professional man who rides in it, or is used for the profession of its owner, it is not used for a domestic purpose. The point that this was a supply of water for a trade or business is really not arguable. In my opinion, the justices were right and this appeal must be dismissed.

DARLING J. I am of the same opinion. It follows from the judgment of Lord Campbell C.J. in *Busby* v. *Chesterfield Waterworks and Gaslight Co.* (1), that water used for washing a carriage is prima facie used for a domestic purpose. But it is possible that a carriage may be kept for the purposes mentioned in s. 12 of the Waterworks Clauses Act, 1863, and if so it is taken out of the class in which it was placed by the decision in *Busby* v. *Chesterfield Waterworks and Gaslight Co.* (1) If it had been intended to include in s. 12 of the Act of 1863 a carriage so used as is that of the respondent it would, I think, have been done plainly and not in the language of the section.

A. T. LAWRENCE J. I am of the same opinion. It is far too late now to argue that the respondent's carriage was not used for

(1) E. B. & E. 176.

domestic purposes. I can see no ground for doing that which Mr. Mackenzie, on behalf of the appellants, asks us to do, viz., to insert the words "or doctor" after the words "common carrier" in s. 12 of the Act of 1863.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Parker, Pritchards, Barham & Lawford, for J. Turner Taylor, Harrogate.*

Solicitors for respondent: *Collyer-Bristow, Hill & Co., for Titley & Paver-Crow, Harrogate.*

J. E. A

[IN THE COURT OF APPEAL.]

C A.

1907

June 21.

IN THE MATTER OF AN ARBITRATION BETWEEN CARPENTER AND OTHERS AND THE CORPORATION OF BRISTOL.

Compensation for Loss of Office—"Office"—"Place, Situation, or Employment"—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *ss.* 100, 120.

A local Act, by which a poor law union and a rural district were dissolved, provided that any officer of the guardians or rural district council who should be in office at the commencement of the Act, and who by virtue thereof should suffer direct pecuniary loss, should be deemed to be an officer entitled to compensation within the meaning of s. 120 of the Local Government Act, 1888, and that that section should apply accordingly. By s. 100 of that Act the expression "office" includes "any place, situation or employment," and the expression "officer" is to be construed accordingly.

A firm of solicitors were during a period of about twenty-six years next before the commencement of the Act from time to time employed by the board of guardians of the union and the rural district council to do such legal work as those bodies required to have done, receiving by way of remuneration for that work the usual professional costs and charges payable to solicitors for such work; and during that period no other solicitor was employed by the board of guardians or council:—

Held, that the solicitors so employed could not be considered as officers of or as holding any "place, situation or employment" under the board of guardians or rural district council within the meaning of ss. 100, 120, of the Local Government Act, 1888.

APPEAL from the judgment of Kennedy J. upon a case stated by an arbitrator.

C. A. 1907

CARPENTER AND BRISTOL CORPORATION, *In re.*

By the Bristol Corporation Act, 1904, it was provided that from and after the commencement of the said Act, that is to say, from and after October 1, 1904, an area in the said Act called the "added area," comprising certain parishes or parts of parishes theretofore in the Barton Regis Poor Law Union, and in the Barton Regis Rural District, should be transferred to the unions and districts therein mentioned; and it was further provided that, from and after the commencement of the said Act, the Barton Regis Union should cease to exist, and that all officers of the guardians of the said union should cease to hold office as such; and that the Barton Regis Rural District Council should be dissolved, and that all the officers of the said council should cease to hold their respective offices and employments. By s. 18 of the said Act it was provided (so far as is material for the purposes of this report) as follows: "(1.) Any clerk or other existing officer of the Barton Regis Council" (which was defined by s. 3 of the said Act to mean the Barton Regis Rural District Council) "who shall be in office at the commencement of this Act, and who by virtue of this Act shall suffer any direct pecuniary loss, shall be deemed to be an officer entitled to compensation within the meaning of s. 120 of the Local Government Act, 1888, and that section shall apply accordingly with the substitution of the Corporation" (which was defined by s. 3 of the said Act to mean the lord mayor, aldermen, and citizens of the city of Bristol, and was in the case referred to as the Corporation) "for the county council and the Local Government Board for the Treasury. Such compensation may (at the option of the Corporation) be by way of annuity or by payment of a sum in gross. (2.) Any such compensation shall be paid by the Corporation. (3.) The non-acceptance of any office by any such clerk or officer shall not be a bar to his right to compensation." It was provided by s. 57 of the said Act (so far as is material for the purposes of this report) as follows: "(1.) Any clerk or other officer of the Barton Regis guardians who shall be in office at the commencement of this Act, and who by virtue thereof shall suffer any direct pecuniary loss, shall be deemed to be an officer entitled to compensation within the meaning of s. 120 of the Local Government Act, 1888, and that section shall apply accordingly

with the substitution of the Bristol guardians for the county council and the Local Government Board for the Treasury. Such compensation may at the option of the Bristol guardians be by way of annuity or by payment of a sum in gross. (2.) Any such compensation shall be paid by the Bristol guardians out of their common fund. (3.) Provided always that the non-acceptance of any office shall not be a bar to the right of any officer to compensation." It was provided by s. 53 of the said Act (so far as the provisions of that section are material to this report) as follows: "(9.) The Corporation shall award compensation as from the commencement of this Act to such of the officers of the Barton Regis guardians and the Barton Regis Council as are entitled to compensation under this Act, the amounts of such compensation to be fixed as soon as may be after the passing of this Act, and such of the said officers as so desire shall be entitled to have their compensation paid by way of a sum in gross to be paid on the Post Office scales. (12.) Any dispute or difference arising between the Corporation and any person or persons who are or may be interested in the provisions of this section as to the proper construction of such provisions, or as to the carrying out of the matters dealt with in this section, or anywise in connection therewith, shall be referred to the decision of Alexander Macmorran, one of His Majesty's counsel, whose decision shall be final. The expense of any inquiry under this provision shall be borne by the Corporation."

A claim of compensation under the above-mentioned Act was made by Robert Henry Carpenter, William Charles Henry Cross, and Thomas Webb Williams, practising as solicitors at Bristol under the name or style of Benson, Carpenter, Cross & Williams, and, the Corporation having disputed their claim, the dispute was referred, pursuant to the provisions of the Act, to Mr. Macmorran, who stated his award in the form of a special case.

The special case, so far as material to this report, was as follows:—

(1.) Before the year 1873 William Benson was in practice as a solicitor in Bristol. In that year he entered into partnership with Robert Curre Thomas, and the practice was thereafter carried on under the name or style of Benson & Thomas. Mr.

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Thomas retired from the firm on December 27, 1877, and Mr. Benson again practised alone until September 29, 1878, when he was joined by Robert Henry Carpenter, and the firm thereafter continued to practise under the name or style of Benson & Carpenter. Mr. Benson died on December 30, 1888, and in the following February Mr. Carpenter was joined by Thomas Webb Williams and John Nichols, the firm thereafter practising under the name or style of Benson, Carpenter & Co. Mr. Nichols retired from the firm on December 31, 1895, and immediately afterwards the firm was joined by William Charles Henry Cross; and from that date onward down to the present time the firm has consisted of Mr. Carpenter, Mr. Cross, and Mr. Williams, the name or style of the firm being Benson, Carpenter, Cross & Co.

(2.) Before Mr. Carpenter joined the firm in 1878 Mr. Benson had acted as solicitor for the Barton Regis guardians and the Barton Regis Rural Sanitary Authority. He was never formally appointed solicitor, but all legal matters which required to be submitted or entrusted to a solicitor were submitted or entrusted to him, and neither the guardians nor the rural sanitary authority ever employed any other solicitor. The clerk to the guardians and the authority was in the habit of referring to him as the recognized solicitor of the guardians and of the authority, and his action in so doing was always ratified or confirmed by the guardians or authority as the case might be.

From 1878, when Mr. Carpenter joined the firm, the same course was adopted. The firm were not formally appointed officers, but they alone acted as solicitors for the guardians and for the rural sanitary authority (who were succeeded after 1894 by the rural district council). They received the usual professional charges for the work actually done. A bundle of extracts from the minutes of the guardians, the rural sanitary authority, and the rural district council was produced to me (the arbitrator), from which it appeared that these bodies referred to the firm as their solicitors, or as the board's solicitors. The said bundle may be referred to as part of the case.

(7.) I was of opinion, and I find, that Messrs. Benson, Carpenter, Cross & Co. were the solicitors to the guardians and to the rural district council in 1904, when the Bristol Corporation Act

of 1904 came into operation, that the members of the firm for the time being had been such solicitors since 1878, that by reason of the operation of the said Act they were deprived of their offices as such solicitors, and that they were in the circumstances officers entitled to compensation under the said Act.

The questions stated by the arbitrator at the end of the case were as follows: (1.) Whether the arbitrator had power to state his award in the form of a special case. (2.) Whether, assuming that he had such power, the claimants or any of them could be said to be entitled in point of law to compensation in respect of their offices of solicitors to the Barton Regis guardians and Rural District Council.

Kennedy, J. held in the negative in answer to the first question stated by the special case, which turned to a great extent on the construction of the local Act, and therefore gave judgment for the claimants. Against this decision the Corporation appealed, and it was agreed that, if the Court of Appeal thought that his decision in that respect was wrong, the Court of Appeal should decide the second question raised by the case instead of remitting the case to the Divisional Court. The Court of Appeal was of opinion that the decision of Kennedy J. on the first question was wrong, and therefore the second question was argued before them.

Cripps, K.C., and *C. A. Russell, K.C.* (*Holman Gregory* with them), for the Corporation of Bristol. The claimants in the present case were not "officers" of the board of guardians or rural district council. They had no "place, situation or employment" within the meaning of the definition of an office given by s. 100 of the Local Government Act, 1888. The only relation between them and the guardians and rural district council was the ordinary relation of solicitor and client. The case comes precisely within the decision of the Irish Court in *Reg.* v. *Armagh Urban District Council.* (1)

Danckwerts, K.C., and *Vesey Knox, K.C.*, for the claimants. It was really a question of fact for the arbitrator whether there had been in truth and in substance such a continuous employment of the claimants as solicitors in the past and there was

(1) [1901] 2 I. R. 28.

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such a probability of the continuance of that employment in the future as to constitute an employment in the nature of an office, and therefore the subject of compensation under the Act. The authorities shew that, in the case of such provisions for compensation in respect of the loss of an office as are here in question, it is not necessary that there should be an office in the strict legal sense of the term, or that the employment should be remunerated by a salary, or in any particular way. It is sufficient if there was a course of employment in the service of the guardians and council which, but for the Act, might reasonably be expected to continue. [They cited *Reg.* v. *Mayor, &c., of Norwich* (1); *Reg.* v. *Mayor, &c., of Carmarthen* (2); *Reg.* v. *Local Government Board* (3); *Scott* v. *Clifton School Board* (4); *Nell* v. *Longbottom* (5); *Rex* v. *Bridgewater Corporation* (6).]

VAUGHAN WILLIAMS L.J. In this case I have no doubt that the respondents are not entitled to compensation as having been officers of the guardians or the rural district council of Barton Regis at the coming into operation of the Bristol Corporation Act, 1904. Sect. 100 of the Local Government Act, 1888, defines the expression "office" as including "any place, situation or employment," and provides that "the expression 'officer' shall be construed accordingly." In my opinion the term "office" does not extend to an employment which, like that in the present case, is casual in its nature. If the employment is of such a nature that the person employed is employed on each occasion, as it occurs, for the particular matter that may arise on that occasion, in my opinion it does not come within the term "office" or the term "employment" as used in the section. The statements in the special case are to the effect that there was no formal appointment of the respondents as solicitors to the guardians or the rural district council, but that all legal matters which required to be submitted or entrusted to a solicitor were submitted and entrusted to them, and that they received the usual professional charges for the work actually done; that is to say,

(1) (1838) 8 A. & E. 633.
(2) (1839) 11 A. & E. 9.
(3) (1874) L. R. 9 Q. B. 148.
(4) (1884) 14 Q. B. D. 500.
(5) [1894] 1 Q. B. 767.
(6 (1837) 6 A. & E. 339.

they did not receive a salary, or any other such emolument, but were paid the usual costs and charges of solicitors for the particular work which might from time to time require to be done. A bundle of extracts from the minutes of the guardians, the rural district authority, and the rural district council is made part of the case. I have considered these extracts, and, looked at as a whole, I think the result of them is to shew that, though these solicitors were continually employed by the bodies in question, and no other solicitors were employed by them, there was in effect in each case a retainer of them to act as solicitors in relation to the particular matter in hand.

Under these circumstances the case appears to me to come exactly within the reasoning of Lord O'Brien C.J. in *Reg.* v. *Armagh Urban District Council.* (1) He there said, after describing the nature of the services rendered by the claimant in that case and the circumstances under which they were rendered, which were similar to those of the present case: "This was the position of Mr. Peel. Having regard to this position, was he 'an officer'?" Then, after referring to the definition of an "officer" given by the Act there in question, which was the same as in the Local Government Act, 1888, he says: "In my opinion this definition does not include a man employed to do mere casual jobs, who is remunerated from time to time as they arise, even though there may be an understanding that he is to do them as they arise, and to be paid accordingly. If this were so, the definition would include a plumber, between whom and the town commissioners there was an understanding that he should do and be paid for doing the plumbing business of the body as it from time to time arose. This would be an extreme and wholly untenable proposition." The other judges in that case all took the same view. In my opinion, so long as solicitors are merely being employed as such and remunerated in the usual way by payment of the ordinary costs and charges to which they are professionally entitled, they are not officers within s. 100 of the Local Government Act, 1888, and are not within the term "employment" as used in that section. I do not propose to go at length through the cases in which it has been held that

(1) [1901] 2 I. R. 28.

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Vaughan Williams L.J.

compensation was payable under Acts of this kind, but none of them in my opinion is in point to the present case. In some of those cases the claimant of compensation appears to have been an "officer" in the strict sense of the term. In others there was an employment by a public body at a fixed salary, or some employment which entitled the holder to certain fees or emoluments by virtue of the employment. There is nothing of that kind in the present case. I am of opinion, therefore, that we ought to answer the question put to us by the case by saying that the respondents are not entitled in point of law to compensation in respect of their offices of solicitors to the Barton Regis guardians and Rural District Council.

FLETCHER MOULTON L.J. I am of the same opinion. If the claimants had been solicitors employed to do the whole work of the guardians and the rural district council at a fixed salary, different considerations might have applied to the case. There is really nothing in the present case to differentiate the relation between the claimants and the guardians and council of Barton Regis from the ordinary relation of solicitor and client. They were simply employed by the guardians and the rural district council from time to time to do each particular piece of work which required to be done as it arose, and were paid for it by the usual professional charges.

BUCKLEY L.J. I agree. I can express my judgment in the words used by Pearson J. in *In re Great Western Forest of Dean Coal Consumers' Co.* (*Carter's Case*). (1) He there said: "If the matter were res integra, I should have great difficulty in holding that a solicitor is an officer of the company within the words of the section. (2) A banker has been held not to be an officer: *In re Imperial Land Co. of Marseilles* (3), and to my mind a solicitor stands in the same position towards the company as a banker does. The solicitor does certain business for the company, which the company applies to him to do from time to time at the ordinary remuneration just as other clients do. I am at a loss to see

(1) (1886) 31 Ch. D. 496.
(2) Sect. 165 of the Companies Act, 1862.
(3) (1870) L. R. 10 Eq. 298.

how a solicitor by taking upon himself that professional duty puts himself in any other relationship to the company than he stands in to his other clients. They come to him when they want him. They can discharge him or cease to send him work. They can part company as and when they please. His remuneration is not a salary paid to him as an officer: but the ordinary remuneration which, according to the ordinary well-established scale of fees, he is entitled to demand either from a company or a private individual, who is his client." The view so taken was approved in *In re the Liberator Permanent Benefit Building Society.* (1) As regards the case of *Reg.* v. *Mayor, &c., of Norwich* (2), cited by Mr. Danckwerts, it was a decision which turned upon the terms of s. 66 of the Municipal Corporations Act (5 & 6 Will. 4, c. 76), and, when examined, it seems to me to be an authority, not in favour of, but against Mr. Danckwerts' contention. The decision comes in effect to this: that the language of s. 66 was such that the Lords of the Treasury, in awarding compensation for the loss of an office, might treat the office as that which in point of law it was not; and therefore, in a case where the town council had allowed to the steward of a borough compensation as for an annual office only, the Lords of the Treasury were not bound to consider only the legal tenure, but might, under the circumstances, award compensation as for an office held for life. The case of *Reg.* v. *Local Government Board* (3) differs from the present case, for there the solicitor had been appointed at an annual salary.

Judgment for the Corporation of Bristol.

Solicitors for claimants: *Rawle, Johnstone & Co., for Benson, Carpenter, Cross, Williams & Co., Bristol.*

Solicitors for corporation of Bristol: *Robins, Hay, Waters & Hay, for Edmund J. Taylor, Bristol.*

(1) (1894) 71 L. T. 406. (2) 8 A. & E. 633
(3) L. R. 9 Q. B. 148.

E. L.

C. A.
1907
June 29.

[IN THE COURT OF APPEAL.]

LEVER BROTHERS *v.* ASSOCIATED NEWSPAPERS.

Practice—Interrogatory—Libel—Defence—Fair Comment—Express Malice.

The plaintiffs, who were traders, sued the defendants for libel in respect of articles published in the defendants' newspapers relating to the manner in which the plaintiffs were alleged to be carrying on their business. The defendants pleaded justification and fair comment, and the plaintiffs joined issue. The defendants administered to the plaintiffs the following interrogatory: "Do you intend to set up that the defendants, in publishing the words complained of, were actuated by express malice towards the plaintiffs? If yea, state generally the facts and circumstances on which the plaintiffs rely as shewing actual malice":—

Held, that the interrogatory was inadmissible.

Appeal by the plaintiffs from an order of Jelf J. in chambers affirming an order of the Master allowing an interrogatory.

The action was for damages for libel. The plaintiffs were manufacturers of and dealers in soap, and the alleged libels were contained in a series of articles, published in two newspapers of which the defendants were the proprietors, relating to the manner in which the plaintiffs were alleged to be carrying on their business. The defence, inter alia, was that, in so far as the words complained of consisted of allegations of fact, they were true in substance and in fact; in so far as they consisted of comments, they were fair comments, made in good faith and without malice, upon the said facts, which were matters of public interest. The plaintiffs joined issue.

The defendants administered to the plaintiffs the following interrogatory: "Do you intend to set up that the defendants, in publishing the words complained of, were actuated by express malice towards the plaintiffs? If yea, state generally the facts and circumstances on which the plaintiffs rely as shewing actual malice."

The Master and judge in chambers allowed the interrogatory.

The plaintiffs appealed.

Sir E. Carson, K.C., and *Horridge, K.C.* (*F. E. Smith* with them), for the plaintiffs. The interrogatory is inadmissible. It

is not directed to any fact in issue in the case, but is in effect an attempt to force the plaintiffs to state on oath how they propose to conduct their case at the trial. There are two main defences pleaded: first, that the words complained of are true; secondly, that they are fair comment on matters of public interest. The defence of fair comment assumes that the words are not true, for if they are true the defence of fair comment is not required. The issue as to express malice is only relevant to the plea of fair comment, and the onus is on the defendants to prove that plea: *Merivale* v. *Carson*. (1) If they fail to discharge that onus, the question of express malice will not arise, and the interrogatory will be unnecessary. A plaintiff cannot be required to give particulars of express malice: Order XIX., r. 22, the reason being that a plaintiff is entitled to rely on matters arising at the trial and the way in which the defendant's case is conducted as evidence of express malice. For example, if in the present case the defendants at the trial persisted in their plea of justification without any evidence to support it, the plaintiffs would be entitled to rely on that as evidence of express malice. This consideration shews that it cannot be right that the plaintiffs should before trial be pinned down to certain specified matters, and none other, as evidence of express malice. *Cooper* v. *Blackmore* (2) is relied on as an authority for an interrogatory in this form, but in that case there was no actual decision on the point, for the parties agreed that a certain interrogatory should be administered.

Duke, K.C., and *Norman Craig*, for the defendants. It has been the practice to allow an interrogatory in this form ever since the decision of *Cooper* v. *Blackmore* (2), and the practice is right. On the pleadings as they stand the plaintiffs are entitled to give evidence of facts which they rely on as establishing express malice. The defendants are not seeking to find out how the plaintiffs are going to conduct their case at the trial, or what evidence they are going to call, but they have a right to know what facts, if any, the plaintiffs rely on as shewing express malice. "The plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of

(1) (1887) 20 Q. B. D. 275. (2) (1886) 2 Times L. R. 746.

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the evidence which it is proposed to adduce": *Eade* v. *Jacobs* (1), per Cotton L.J. It is a fallacy to say that because express malice is one of the issues raised by the pleadings, the interrogatory cannot be allowed: *Attorney-General* v. *Gaskill*. (2) The defendants are a limited company, and the plaintiffs may be going to rely on something alleged to have been said or done years ago by one of the defendants' directors as evidence of express malice, and if this interrogatory is not allowed the defendants have no means of ascertaining what case they will have to be prepared to meet at the trial. If the interrogatory in its present form is objectionable, it can be amended so as to ask the plaintiffs what facts, if any, antecedent and foreign to the publication complained of, the plaintiffs rely on as shewing express malice. An interrogatory in that form would be entirely free from objection.

FLETCHER MOULTON L.J. I am of opinion that this appeal must be allowed. It is not necessary to give a decision as to what is and what is not the province of interrogatories, because this particular interrogatory appears to me to be so utterly outside that province that there is no nice question to discuss as to the exercise of discretion or the ambit of the rules governing the administration of interrogatories. It is an interrogatory which, in effect, requires the plaintiffs to state on oath what course they propose to adopt at the trial of the action. The very form of the question shews how unsuitable it is for a procedure which requires an answer on oath. To require a party to an action to state on oath that he will or will not do something at the trial is so incongruous that it cannot be in accordance with the procedure of the Court. Either party to an action has full power to put in issue any matters alleged by his opponent. He does so at the peril of having to pay costs. By rashly traversing statements which are obviously true much unnecessary expense may be caused, and therefore there is a procedure by which one party can call upon the other to make admissions of facts, and if a party refuses to make the admission asked for,

(1) (1877) 3 Ex. D. 335, at p. 337. (2) (1882) 20 Ch. D. 519.

he runs the risk of having to pay the costs of proving the facts not admitted. On the same principle, in order to prevent unnecessary expense, the Court often allows interrogatories to be administered. But these are for the purpose of obtaining admissions as to facts, and I have never understood that one party may be allowed by means of an interrogatory to compel his opponent to state on oath what his conduct of the case at the trial is going to be. The practice under which this particular interrogatory has been allowed is said to be based upon the case of *Cooper* v. *Blackmore*. (1) That was a very peculiar case, and when the report, which is very brief, is examined in order to ascertain what was the actual decision, one finds that, after some discussion and an informal expression of opinion from the Bench, the parties agreed that an interrogatory in a particular form should be administered. I do not think that the case can be regarded as an authority in favour of this interrogatory, because I am satisfied that the judges in that case never intended to lay down as a matter of principle that an interrogatory in this form is admissible.

The first part of this interrogatory is, in my opinion, as objectionable as it well could be, and as the latter part depends upon the first part, the whole interrogatory is inadmissible. This appeal must, therefore, be allowed.

BUCKLEY L.J. I am of the same opinion. It is not disputed that, on the pleadings in this action, the question of malice or no malice is in issue. In these circumstances the defendants by this interrogatory ask the plaintiffs in substance whether they are going to raise the issue of malice at the trial, and what evidence they have to support their case on that issue. So stated, the question as to the admissibility of the interrogatory is not arguable.

When it is pointed out to counsel for the defendants that the pleadings must be looked at to ascertain what are the issues raised in the case, and that the pleadings do raise the issue of malice, they say that they want an affirmative statement by the plaintiffs on oath as to whether they are or are not going

(1) 2 Times L. R. 746.

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to fight that issue. I am quite unable to see how such an interrogatory can be justified.

Appeal allowed.

Solicitors for plaintiffs: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

Solicitors for defendants: *Lewis & Lewis.*

F. O. R.

1907 *June* 19.

BRYSON *v.* GAMAGE, LIMITED.

Pistols—Air-gun—Toy or Weapon—Sale by Retail—Pistols Act, 1903 (3 *Edw.* 7, *c.* 18), *ss.* 2, 3.

The Pistols Act, 1903, does not apply to a mere toy, but it does apply to an air-gun if it is a weapon from which a shot, bullet, or other missile can be discharged, although it is not a firearm.

CASE stated by a metropolitan magistrate.

At the Clerkenwell Police Court on February 5, 1907, an information was preferred by the appellant Bryson under the Pistols Act, 1903, s. 3 (1), against the respondents A. W. Gamage,

(1) Pistols Act, 1903 (3 Edw. 7, c. 18), s. 2: "In this Act the term 'pistol' means a firearm or other weapon of any description from which any shot, bullet or other missile can be discharged, and of which the length of barrel, not including any revolving detachable or magazine breach, does not exceed nine inches. The term 'gun or game licence' means a licence to use or carry a gun granted under the Gun Licence Act, 1870, or a licence or certificate to kill game granted under the laws of excise in that behalf."

Sect. 3: "It shall be unlawful to sell by retail or by auction or let on hire a pistol to any person, unless at the time of sale or hire such person either produces a gun or game licence then in force, or gives reasonable proof that he is a person entitled to use or carry a gun without a gun or game licence by virtue of section seven of the Gun Licence Act, 1870, or that, being a householder, he purposes to use such pistol only in his own house or the curtilage thereof, or that he is about to proceed abroad for a period of not less than six months, and produces a statement to that effect, signed by himself and by a police officer of the district within which he resides, of rank not lower than that of inspector, or by himself and by a justice of the peace.

"Every person who sells by retail or lets on hire a pistol shall, before delivery, make, or cause to be made, an entry in a book to be kept for

Limited, for unlawfully selling by retail to a certain person a pistol without the requirements of the section being complied with.

On the hearing of the information the following facts were proved.

On January 18, 1907, the respondents sold by retail to one William Henry Fell the pistol hereinafter described under the following circumstances:—

On January 17, 1907, Fell wrote a letter to the respondents, and sent it by post addressed to them at their premises at 125 and 128, Holborn, London. The letter (so far as material) was as follows:

"Please send me one air-pistol 2*s*. 11*d*. as listed in your catalogue. Enclosed find P.O. value 3*s*. for same."

Enclosed in the letter were postal orders for the payment of 3*s*. On January 19 following, in response to the letter, Fell received by post from the respondents a box containing the pistol, two darts and a box of pellets, and with the box an invoice of the sale.

The pistol had a single barrel, through which the darts or pellets were discharged by means of a spring. The barrel when unloaded and at its extreme length was seven and a half inches long, and when loaded five inches long. To load the pistol the spring was pressed back until it was retained, and the missile was inserted and the pistol was thus loaded. To discharge it the trigger was pulled, which released the spring. A pellet or dart

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that purpose, specifying the description of the pistol, whether single barrel, magazine, revolver, pin, rim, or centre fire, sold or let on hire, the date of such sale or hire, the name and address of the purchaser or hirer, and the office from which the gun or game licence produced by the purchaser was issued, the date of such licence or the circumstances exempting such purchaser or hirer from having such licence. Such book must be produced for inspection on the request of any officer of police or any officer of Inland Revenue.

"If any person—

"(*a*) Contravenes any of the foregoing provisions of this section; or

"(*b*) On the sale, purchase or hire of a pistol knowingly makes, or causes to be made, any false entry or statement as to any matter concerning which he is required by this section to make an entry or statement,

he shall be liable to a penalty not exceeding five pounds."

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discharged from the pistol was capable of inflicting a slight wound.

Fell at the time of the sale did not produce to the respondents any gun or game licence, or give any proof that he was then a person entitled to use or carry a gun without a gun or game licence by virtue of s. 7 of the Gun Licence Act, 1870, or that, being a householder, he purposed using the pistol only in his own house or the curtilage thereof, or that he was then about to proceed abroad for a period of not less than six months, nor did he produce any statement to that effect signed by himself, a police officer, or a justice of the peace. Fell held no communication with the respondents in connection with the sale save by the letter of January 17, 1907. Sect. 3 of the Pistols Act, 1903, was in fact not complied with.

On receiving the pistol Fell handed it to the appellant, on whose behalf he had made the purchase, and on January 26, 1907, the appellant called at the premises of the respondents, when he saw the respondents' representative. At the appellant's request the book or register kept by the respondents in pursuance of s. 3 of the Pistols Act, 1903, was produced. The appellant searched the register, which contained particulars of the sale of firearms, and found that it contained no record of or reference to the sale of the pistol to Fell. The appellant shewed the pistol and invoice to the respondents' representative, who said, "We do not consider that comes within the meaning of the Act, and we do not register."

On behalf of the respondents evidence was called for the purpose of proving that the pistol was of a class not usually sold by gunmakers, and usually, but not exclusively, sold by toy dealers, and that air-guns said to be five or six times more powerful than the pistol were freely exported, classed as toys, to Colonies where regulations as to firearms were stringent.

On behalf of the respondents it was contended (1.) that the Pistols Act, 1903, only applies to firearms; (2.) that the pistol was not a pistol properly so called, but a toy, and not "a weapon . . . . from which any shot, bullet or other missile can be discharged" within the meaning of the Pistols Act, 1903, s. 2.

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On behalf of the appellant it was contended that (1.) the operation of the Pistols Act, 1903, is not confined to firearms; (2.) that the pistol fell within the general definition "weapon of any description from which any shot, bullet or other missile can be discharged, and of which the length of barrel, not including any revolving detachable or magazine breach, does not exceed nine inches."

The magistrate was of opinion that the Pistols Act, 1903, applies to firearms only; that this pistol was not a firearm; and accordingly dismissed the information. If the Act includes air-pistols, he found as a fact that the pistol in question was "a weapon from which any shot, bullet or other missile can be discharged."

The question for the opinion of the Court was whether the magistrate came to a correct determination in point of law—

(1.) That the operation of the Pistols Act, 1903, is confined to firearms;

(2.) That the pistol was a weapon within the meaning of the Act of 1903.

Danckwerts, *K.C.*, and *A. E. Gill*, for the appellant. In s. 2 of the Pistols Act, 1903, the word "firearm" is exhaustive, and therefore the expression "other weapon" means something which is not a firearm. Sects. 2, 7, and 8 of the Gun Licence Act, 1870 (33 & 34 Vict. c. 57), shew that to carry an air-gun a person requires a gun licence, and s. 2 of the Game Licences Act, 1860 (23 & 24 Vict. c. 90), requires a person using a dog, &c., to take game, to have a licence. The title of the Pistols Act, 1903, is, "An Act to regulate the sale and use of pistols or other firearms"; and it must be admitted that there is a well-known principle that the title of a statute may be looked at in order to construe it where the language of the statute is ambiguous; but apart from that the title is not to be regarded. In *Shaw* v. *Ruddin* (1) Lefroy C.J. laid down that rule. It might possibly be suggested that the expression "pistols" in the title means "firearm pistols," because the words "or other firearms" occur in the title. But it is clear that, whatever may

(1) (1858) 9 Ir. C. L. R. 214.

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be the primary purpose of the statute, the Legislature has gone further, because in s. 2 it says "the term 'pistol' means a firearm or other weapon."

In *Fielding* v. *Morley Corporation* (1) and *Reg.* v. *Cockerton* (2) it was laid down that the title may be taken into consideration in construing a statute, but in neither of those cases did the Court say that the title is conclusive as to the effect of the statute, but only that it is one of the matters to be taken into consideration. Where the words of the statute are clear and unambiguous the title is useless. Anything which is capable of being used as a thing of offence or defence, as this pistol is, is a weapon. [*Powell* v. *Kempton Park Racecourse Co.* (3) was also referred to.]

Avory, K.C., and *George Elliott*, for the respondents. The real question in this case is whether this thing is a weapon within the meaning of the Act. The magistrate apparently had not that question in his mind. It must be admitted that s. 2 of the Pistols Act, 1903, controls and goes further than the title of the statute, and it is therefore not contended on behalf of the respondents that the statute is limited to firearms in the strict sense of the word. It obviously includes any other weapon of any description from which any shot, bullet, or other missile can be discharged. A weapon is an instrument of offence or defence used in a hostile way against an enemy, and the real question here is, Is this thing a weapon or is it a toy? The Pistols Act, 1903, can only be construed and applied reasonably if that distinction is drawn.

The case ought to go back to the magistrate with the opinion of the Court that the Act of 1903 was not intended to apply to things which in fact are toys. The statute was not intended to apply to toys, even though they may be dangerous. [Sect. 4 of the Pistols Act, 1903, was also referred to.]

Danckwerts, K.C., in reply. The case ought not to be remitted to the magistrate. There ought to have been a conviction. The true distinction is that if the thing is capable of being used otherwise than as a mere toy it is within the Act of 1903.

(1) [1899] 1 Ch. 1. (2) (1900) 17 Times L. R. 165.
(3) [1899] A. C. 143.

The magistrate clearly had before his mind the consideration that the pistol was not capable of merely being used as a toy, but could be used as a weapon.

LORD ALVERSTONE C.J. I do not intend by anything that I say in any way to fetter the judgment of the magistrate. I think it is quite possible that he may take the view that this thing is not a toy, but I think it right to say that, in my opinion, the Pistols Act, 1903, was not intended to apply to mere toys, and if the magistrate has decided that this is not a mere toy, but is a weapon, in my opinion he ought to have convicted. But there is some doubt whether he meant to go quite as far, because the special case contains the statement: "I was of opinion that the Pistols Act, 1903, applies to firearms only. . . . . If the Act includes air-pistols, I find as a fact that the pistol in question is 'a weapon. . . . '" That statement may possibly mean "If the Act includes all air-pistols," and if it does, the question arises whether the statute applies to an air-pistol which is only a toy. Therefore, without saying that the magistrate may not, and ought not, to find that this thing is a weapon, the case must go back to him with our direction to the effect that the statute is not intended to deal with or to prohibit the sale of mere toys, and that if he finds this pistol is a toy, his present decision ought to be affirmed; but if he finds it is not a mere toy, but "a weapon from which any shot, bullet, or other missile can be discharged" as distinguished from a mere toy, he ought to convict.

DARLING J. I am of the same opinion. I think that it is absolutely essential that the magistrate should decide whether this thing is a weapon. If it is a weapon from which a shot, bullet, or other missile can be discharged, it comes within the meaning of the Act of 1903; but there are, of course, very many weapons from which shots and bullets cannot be discharged, such as a sword. Supposing a person were dealing with the question of whether a sword was a weapon. The sword might be in every sense a sword, and yet a person to whom it was shewn might say, "I decline to say that this thing is a weapon. A

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Darling J.

sword may be a weapon, and a most dangerous one, and this thing which you shew me is capable of inflicting a wound, and perhaps a dangerous one, and yet, having regard to what a sword is intended, in an offensive and defensive manner, to do, I decline to regard this sword as a weapon." So with the pistol which is the subject of the present charge. The magistrate may examine it and see what it will do, and come to the conclusion that it is or that it is not a weapon. In order to do that, I think he should carefully inform his mind as to what a weapon is and what it is meant for in the way of offence and defence, and then if he decides it is a weapon, it obviously discharges a bullet and would therefore be within the statute; if it is not a weapon, it could not be within the statute.

A. T. LAWRENCE J. I am of the same opinion.

Case remitted.

Solicitors for appellant: *Wontner & Sons.*
Solicitors for respondents: *Ward, Perks & Mackay.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1907
June 25, 26.

CHORLEY CORPORATION *v.* NIGHTINGALE.

Highway—Ditch alongside of—Whether Part of Highway—Extent of Dedication.

There is no rule of law that a ditch running alongside a highway between the road and the fence cannot be dedicated as part of the highway merely because it is not part of the roadway and cannot be used by the public for purposes of passage.

Appeal from the decision of a Divisional Court (Kennedy and A. T. Lawrence JJ.), reported at length [1906] 2 K. B. 612.

The case in the Divisional Court, to which it came on appeal by the plaintiffs from the judge of the Chorley County Court, raised two questions—first, whether a ditch running alongside a highway can in law be dedicated to the public as part of the highway; and, secondly, whether there was any evidence in the present case upon which the county court judge could properly find that the whole area of the highway, including the ditch in question, had in fact been dedicated to the public. Upon the first question the Divisional Court held that there was no rule of law that a ditch cannot form part of a highway; upon the second they held that there was evidence to support the finding of fact by the county court judge; they therefore dismissed the appeal. The plaintiffs appealed.

In the Court of Appeal the point of law was not insisted upon by the plaintiffs' counsel, although it was not formally abandoned, and the argument proceeded mainly upon the question of whether there was evidence to support the county court judge's finding. Under these circumstances a detailed report is unnecessary.

C. A. Russell, K.C., and *Fleetwood Pritchard*, for the plaintiffs.

Danckwerts, K.C., *R. Cunningham Glen*, and *A. A. Bethune*, for the defendant, were not called upon.

The Court (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.) said that the plaintiffs' contention that the ditch could not in law form part of the highway had been

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practically, though not technically, abandoned in argument, and was in their view untenable. There remained, therefore, only the question whether there was any evidence to support the finding of fact of the county court judge that there had been a dedication to the public of the whole area between the fences on either side of the road, including the ditch, and, there being evidence both ways, they could not interfere with the finding.

Appeal dismissed.

Solicitors for plaintiffs: *Sharpe, Parker & Co., for Kevill, Chorley.*

Solicitor for defendant: *W. Buttle, for Whitfield, Chorley.*

W. J. B.

1907
June 19.

THE KING *v.* MARSHAM.
Ex parte CHAMBERLAIN.

Locomotives—Motor Car—Conviction for driving at excessive Speed—Indorsement on Licence—First or Second Offence—Parks Regulation Act, 1872 (35 & 36 *Vict. c.* 15)—*Rules* 3 *and* 4 *of the Rules made by the Commissioners of Works and Public Buildings—Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 4.

Where the driver of a motor car is convicted of a first or second offence of exceeding a speed limit fixed in a lawful way other than under the Motor Car Act, 1903, e.g., under rules made by the Commissioners of Works and Public Buildings in connection with the regulations prescribed by the Parks Regulation Act, 1872, the Court before whom the conviction takes place has no power under s. 4 of the Act of 1903 to indorse on the convicted person's licence particulars of the conviction.

RULE nisi obtained at the instance of one Robert Chamberlain calling upon a metropolitan magistrate to shew cause why a writ of certiorari should not issue to remove into the High Court a record of a conviction for driving a motor car in St. James's Park at a greater speed than ten miles an hour, and an indorsement on a motor car licence of particulars of the conviction.

Notice was given that in the event of the Court making absolute

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the order for the writ the Court would be asked to order that the indorsement of the licence when returned be quashed without further order. The applicant Chamberlain had never previously been convicted of any offence in connection with the driving of a motor car, and he was summoned for driving the motor car on February 13, 1907, in St. James's Park, at a greater speed than ten miles an hour, contrary to the regulations made by the Commissioners of Works and Public Buildings on April 28, 1904, under the Parks Regulation Act, 1872, and published by notice exhibited in the park. He was convicted and fined 40*s.* and 2*s.* costs, and the magistrate caused his licence to be indorsed with the conviction. The Motor Car Act, 1903, s. 4, provides: "(1.) Any Court before whom a person is convicted of an offence under this Act, or of any offence in connection with the driving of a motor car, other than a first or second offence, consisting solely of exceeding any limit of speed fixed under this Act . . . . (*c*) if the person convicted holds any licence under this Act, shall cause particulars of the conviction and of any order of the Court made under this section to be indorsed upon any licence held by him, and shall also cause a copy of those particulars to be sent to the council by whom any licence so indorsed has been granted. . . . ." Rule 3 of the rules, dated April 28, 1904, made for St. James's and Green Parks by the Commissioners of Works and Public Buildings in connection with the regulations prescribed by the Parks Regulation Act, 1872, provides that "Drivers of all vehicles must conform to such orders for the regulation of traffic as may be given by the park-keepers or published by notice exhibited in the parks." Rule 4 provides that "Cars propelled or drawn by mechanical means shall only be admitted subject to such regulations as may from time to time be framed by the Commissioners of His Majesty's Works and Public Buildings, and published by notice exhibited in the parks." A notice under the seal of the Commissioners limiting the speed of motor cars to ten miles an hour was exhibited at the entrance to the park.

G. R. Askwith shewed cause. This conviction was not for a first or second offence of exceeding a limit of speed "fixed under

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this Act," i.e., under the Motor Car Act, 1903, because the speed limit was fixed by the Commissioners of Works and Public Buildings under the Parks Regulation Act, 1872. The magistrate was therefore compelled to indorse the licence, inasmuch as the conviction was for an offence "in connection with the driving of a motor car" within the meaning of the first part of s. 4, sub-s. 1, of the Motor Car Act, 1903: *Musgrave* v. *Kennison.* (1) At the time the Act of 1903 was passed it was known that the Commissioners of Works and Public Buildings had power to make regulations under the Parks Regulation Act, 1872. The Commissioners have limited the speed of motor cars to ten miles an hour, and have said nothing with reference to licences not being indorsed. The result is that the applicant has been convicted of an offence in connection with the driving of a motor car. It was not the offence of exceeding the speed limit fixed under the Motor Car Act, 1903, but of exceeding the limit fixed under the Parks Regulation Act, 1872. Therefore the indorsement of the licence followed.

Horace Avory, K.C., and *Cleave*, in support of the rule. Sect. 4, sub-s. 1, of the Motor Car Act, 1903, casts no duty on the magistrate to indorse the licence where the conviction is solely for exceeding a limit of speed, and it is the first or second offence. The words "fixed under this Act" do not prevent the exception applying merely because the limit of speed of ten miles an hour was not fixed under the Act of 1903. The words are surplusage—at any rate where, as in the present case, there is power to fix the limit of ten miles an hour under s. 9, sub-s. 1, of the Motor Car Act, 1903, and also under the Parks Regulation Act, 1872. The intention of the Motor Car Act, 1903, was that in all cases where a speed limit, lawfully fixed by any authority, is exceeded, the conviction after the second offence should be indorsed. The result of any other construction would be that a person might drive at forty miles an hour outside the park, and the conviction for the first or second offence could not be indorsed, because it would be for exceeding a speed limit fixed by the Act of 1903; but if he drove at eleven miles an hour in the park a conviction would have to be indorsed, because the speed limit is

(1) (1905) 21 Times L. R. 600.

fixed under the Parks Regulation Act, 1872. That result could not have been intended, but it would follow, having regard to the rule laid down in Paley on Summary Convictions, 8th ed. p. 296, that "In affixing the punishment of an offence, which may be proceeded against upon one or other of two different statutes, care must be taken not to blend the penalties under both."

[The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), the Motor Car Act, 1903, s. 20, and *Rex* v. *Hoseason* (1) were also referred to.]

LORD ALVERSTONE C.J. This is a difficult case. If the language of s. 4 of the Motor Car Act, 1903, is construed without consideration of any other statute or regulations it would be difficult to say that the applicant had not been convicted of an offence in connection with the driving of a motor car in respect of which the magistrate was bound to indorse his licence. It seems to me, however, that either we must regard the question which arises upon the present state of facts as a casus omissus, or we ought to construe the statutes bearing upon it having regard to their application at the time the Motor Car Act, 1903, was passed. The Act of 1903 provides by s. 9, sub-s. 1, that a person shall not drive on a public highway, which for this purpose must be taken to include a road to which the public have access, at more than twenty miles an hour. It also provides that on the application of the local authorities in certain areas the Local Government Board may make regulations, and that within those areas a limit of speed is not to be exceeded. Various local authorities have had limits of speed fixed within their boroughs less than twenty miles an hour, as, for instance, boroughs that have a limit of ten miles. The framers of the Act of 1903 no doubt overlooked the fact that regulations might possibly be made with regard to the speed of traffic under the Parks Regulation Act, 1872. Had they had that statute in their minds I have no doubt that they would have included words in s. 4, sub-s. 1, of the Motor Car Act, 1903, which would have treated a first or second offence of exceeding a limit of speed where the limit was fixed under the Parks

(1) (1811) 14 East, 605.

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Regulation Act, 1872, in exactly the same way as a first or second offence of exceeding a limit of speed where the limit is fixed under the Motor Car Act, 1903.

It was contended by Mr. Askwith in shewing cause against the rule that, inasmuch as this was a conviction for driving otherwise than in accordance with the rules made under the Parks Regulation Act, 1872—that is to say, at a greater speed than ten miles an hour, contrary to the regulations made by the Commissioners of Works and Public Buildings—there was an obligation upon the magistrate to indorse particulars of the conviction upon the licence. Now I think that it may fairly be urged that s. 4, sub-s. 1 (*c*), which directs the Court to indorse the particulars of the conviction upon the licence and to send a copy of those particulars to the council, is a direction that they are to indorse it in the cases that are included in s. 4, sub-s. 1, namely, in cases "other than a first or second offence consisting solely of exceeding any limit of speed," and then, inasmuch as the limit of speed was fixed by the statute, the words were added "fixed under this Act," meaning thereby by the Act of 1903, or by a regulation made under the powers of the Act. I cannot think that those words ought to be construed so as to involve the obligation to indorse the first or second offence of going too fast simply upon the ground that the speed limit is fixed in some other lawful way. I do not desire to rely too much on the absurdities that might arise from that construction; but I must say this—that it does seem to me a very strong argument in favour of the more sensible view being taken that if a person drove just outside the park in the borough of Kensington or in London at forty or fifty miles an hour, and was properly summoned and convicted for so doing, his licence would not be indorsed, whereas if he were going eleven miles an hour inside the park it must be indorsed. I am of opinion that the present case is either not covered by the Motor Car Act, 1903, or else we ought to construe the words "fixed under this Act" in s. 4, sub-s. 1, as not excluding limits of speed fixed by regulations made for the parks by the Commissioners of Works and Public Buildings, but as being intended to indicate that convictions for exceeding any speed limits, if merely

for a first or second offence, were not to be the subject of indorsement.

The indorsement on the licence must therefore be quashed.

DARLING J. I am of the same opinion. It seems to me that s. 4 of the Motor Car Act, 1903, deals, amongst other things, with the offence of exceeding the limit of speed, and then an exception is made in favour of persons who exceed that limit of speed for the first or second time. If it were not for the words at the end of sub-s. 1 of s. 4, "limit of speed fixed under this Act," there would be no doubt that this indorsement upon the licence would be wrong. Now it seems to me that the words "fixed under this Act" are not sufficient to prevent the exception applying to the case of a person driving in the park, and who is therefore subject to the regulations made by the Commissioners of Works and Public Buildings, if regard be had to the extreme absurdities and the injustice that would follow from holding that those words are sufficient to deprive a person driving over ten miles an hour in the park of the protection which would or might be accorded to him if he drove up to 100 miles an hour outside the park. As to the absurdities that would follow from that construction, one of the most manifest of them appears to me to be this: that because the offence with which we are dealing happened in the park there would be no appeal against this indorsement, but under s. 11, sub-s. 2, of the Act of 1903 it is enacted that "Any person adjudged to pay a fine exceeding 20*s.* under this Act may appeal against the conviction . . . ."; so that a person convicted of exceeding the limit of speed fixed by regulations made under the Parks Regulation Act, 1872, would be deprived of the benefit of the exception contained in s. 4, sub-s. 1, of the Act of 1903, because the limit of speed to which the exception would apply would be that only which is fixed under the Act of 1903, and at the same time he would be deprived of the right of appeal which he would have under s. 11, sub-s. 2, of the Act of 1903, because he would not have been convicted under the Act. Another apparent absurdity would be this: This road in the park is a road to which the public are granted access. Now s. 20 of the Motor Car Act, 1903, provides

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that "The provisions of this Act and of the principal Act shall apply in the case of a roadway to which the public are granted access, in the same manner as they apply in the case of a public highway." That deals with many provisions to which the exception contained in s. 4, sub-s. 1, of the Act of 1903 would apply; but s. 9 says: "Section 4 of the principal Act (which relates to the rate of speed of motor cars) is hereby repealed, but a person shall not, under any circumstances, drive a motor car on a public highway at a speed exceeding twenty miles per hour, and, within any limits or place referred to in regulations made by the Local Government Board with a view to the safety of the public, on the application of the local authority of the area in which the limits or place are situate, a person shall not drive a motor car at a speed exceeding ten miles per hour." Therefore, it would seem, if a person drove at a speed exceeding ten miles an hour, the exception would apply, provided the limit of ten miles an hour had been fixed by the Local Government Board with a view to the safety of the public; but if it had not been fixed by the Local Government Board, but by the authority that regulates the parks, he would have no appeal, nor the benefit of the exception. No reason has been given in argument why a person should be deprived of these advantages if he commits the offence in the park, whereas he would be entitled to them all if he committed the offence in a very much more crowded thoroughfare where proceeding at a high rate of speed might be far more dangerous. For these reasons, although I admit that the words are certainly capable, grammatically, of the construction put upon them by Mr. Askwith on behalf of the respondent, I think it would be so manifestly against the whole spirit of the statute—to be gathered from section after section—that it cannot have been intended by the Legislature to say that which it has been contended on behalf of the respondent the exception means.

A. T. LAWRENCE J. I am of the same opinion, although I have great difficulty in construing s. 4 of the Motor Car Act, 1903, in any manner which does not result in a conclusion favourable to Mr. Askwith's argument on behalf of the respondent. I think, however, that the intention of the statute to except from indorsement a conviction for a first and second offence for excess

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of speed limit is so clear that to read the section in the way contended for on behalf of the respondent would be adhering to the letter of the section and departing from the intention and spirit of it. Therefore I have come to the conclusion that the section does not mean that an indorsement must be placed upon the licence in the case of a first or second offence for excess of the speed limit if it happens to be in the park as distinguished from any other place where motor cars pass and repass. I think that the words "fixed under this Act" were supposed at the time the Act of 1903 was passed to cover all cases of speed limits, and that it was not foreseen at that time that there might be, under some other statutes then in existence, limits of speed fixed in the future, and therefore I think that the true construction of s. 4 is to read it as applicable not merely to speed limits fixed under the Act of 1903, but also to other speed limits—all speed limits fixed lawfully and by due authority. Read in that way, there is no difficulty or absurdity in the section. The section then has the effect of blending the punishments under the Motor Car Act, 1903, and the Parks Regulation Act, 1872. It appears to me that the section intends that the punishments should be blended, and means that where an offence other than a first or second offence consisting solely of exceeding a speed limit is committed in connection with the driving of a motor car there shall be the punishment imposed by the Parks Regulation Act, 1872, and also the indorsement specified in the Motor Car Act, 1903. I cannot read the words of s. 4 of the Act of 1903 in any other way. I am of opinion that the intention of the Legislature was that licences should be indorsed in order to induce drivers of motor cars generally to observe, not merely the provisions of the Motor Car Act, 1903, relating to motor cars, but all other statutes having reference to driving, in order to secure the safety of passengers and of the public. For these reasons I think that this rule should be made absolute.

Rule absolute, and indorsement quashed.

Solicitor for respondent: *Treasury Solicitor.*
Solicitors for applicant: *Firth & Co.*

J. E. A.

C. A.
1907
June 26;
July 4.

[IN THE COURT OF APPEAL.]

YOUNG *v.* HOFFMANN MANUFACTURING COMPANY, LIMITED.

Master and Servant—Dangerous Machinery—Infant Workman—Duty of Employer to instruct—Delegation to Foreman—Negligence of Foreman—Common Employment.

Where a master employs an inexperienced workman upon dangerous work it is his duty to instruct and caution him; but the master may delegate that duty to a competent person, and, if he does so, he will not be liable for an injury to the workman resulting from the negligence of the delegate in not properly instructing or cautioning him. There is no difference in this respect between an adult and an infant workman. Consequently, in an action for negligence against an employer by an infant who has been injured owing to the negligence of the employer's foreman in not fully instructing or cautioning him, it is open to the employer to raise the defence of common employment.

The decision in *Cribb* v. *Kynoch, Ld.* (ante, p. 548) approved.

This was an application by the defendants for judgment or a new trial on appeal from a verdict and judgment at the trial of the action heard before Ridley J. and a common jury at Chelmsford.

The question raised upon the appeal was whether the defence of common employment could be set up in an action for negligence by an infant against his employers where he had been injured owing to an alleged want of proper instruction in the working of a machine.

The plaintiff, a boy of fifteen, was injured through his arm being caught by a circular saw while working in the defendants' engineering works. The jury found that there was negligence on the part of the defendants in not sufficiently instructing the plaintiff in the working of the machine. They found that the foreman, to whom the duty of instructing the plaintiff was delegated by the defendants, had not fully instructed or cautioned the plaintiff. The defendants at the trial desired to raise the defence that they were not liable to the plaintiff for the negligence of their foreman, which was not their negligence. Ridley J. declined to allow this point to be taken, on the ground that it

was not pleaded, and gave judgment for the plaintiff. The defendants appealed.

C. A. Russell, K.C., and *Harold Morris*, for the appellants. It was only at the end of the case that the defendants knew that a substantive charge of negligence in not properly instructing the plaintiff in the use of this machine would be made, and that in setting an inexperienced person to work a dangerous machine the defendants had omitted, by their foreman, to properly instruct and warn the plaintiff, as in *Crocker* v. *Banks* (1) ; to this charge the defence of "common employment" would have been a good answer; but this defence the judge in the Court below would not allow the defendants to raise. In an action by a servant against his employer for an injury caused by the negligence of a fellow-workman common employment is a good defence: *Burr* v. *Theatre Royal, Drury Lane.* (2) No direction on this point was given by the judge to the jury; therefore, unless the judge was right in holding that this defence could not be raised as it was not expressly pleaded, the verdict cannot stand, and there must be a new trial.

An employer is not bound personally to instruct an inexperienced and youthful workman; if he employs a competent person to instruct him, that is sufficient, even if the person to whom this duty has been delegated has been guilty of negligence in not giving proper warning as to the dangerous nature of the work: *Cribb* v. *Kynoch, Ld.* (3), a case which exactly covers the present case.

Low, K.C., and *C. E. Jones*, for the respondent, the plaintiff. It was not open to the defendants in this case to raise the defence of common employment at all. Negligence by the plaintiff only is pleaded, and it was incumbent on the defendants, if they meant to rely on such a defence, to set out in their pleadings that the injury was caused by the negligence of a fellow-servant: this was not done, and the judge was right under these circumstances in refusing to allow this defence to be raised at the last moment, and in refraining from saying anything to the jury upon this point.

(1) (1888) 4 Times L. R. 324. (2) [1907] 1 K. B. 544.
(3) Ante, p. 548.

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Next, the doctrine of common employment, the origin of which was fully discussed in *Wilson* v. *Merry* (1), does not apply in a case like the present, where the person injured is under twenty-one. The Court cannot assume, in the case of a child like this entering into a contract of service with an employer, that he can undertake, or has undertaken, the risk of injury through the negligence of a fellow-servant. The case of a young person, therefore, must be treated differently from the case of an adult, for in the former case the master cannot delegate his own duty to instruct to another so as to avoid liability if there should be a breach of it: *O'Byrne* v. *Burn*. (2) That case is referred to by Lord Chelmsford in *Barton's Hill Coal Co.* v. *McGuire* (3), where he said "it was hardly possible"—in *O'Byrne* v. *Burn* (2)—"to apply the principle of the servant having undertaken the service with a knowledge of the risks incident to it." The employer's duty in such a case as this is to instruct the young and inexperienced workman. He must take care that he is protected by adequate caution and warning. He cannot delegate that duty so as to shift his responsibility. The protection of the servant would become illusory if it were so. Where there is a breach of the duty to instruct, and injury to the workman ensues, the employer is liable unless he is protected by the doctrine of common employment, and that doctrine does not apply in the case of a young person. A master cannot escape the consequences of not instructing or warning a young person in the position of the plaintiff: *Grizzle* v. *Frost* (4); *Robinson* v. *Smith*. (5) The earliest case upon the doctrine of common employment is *Priestley* v. *Fowler* (6), and that was followed by *Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (7) and *Charles* v. *Taylor*. (8)

The cases all go to shew that the doctrine is founded on the notion that the servant must be assumed to have undertaken that he will not regard the acts of his fellow-servant as the acts of the master. That cannot apply to a case of negligence in not

(1) (1868) L. R. 1 H. L. Sc. 326.
(2) (1854) 16 D. 1025.
(3) (1858) 3 Macq. 300, at p. 311.
(4) (1863) 3 F. & F. 622.
(5) (1901) 17 Times L. R. 423.
(6) (1837) 3 M. & W. 1.
(7) (1850) 5 Exch. 343.
(8) (1878) 3 C. P. D. 492.

instructing a young servant. It cannot be assumed that a young child accepts a risk of that kind: *Crocker* v. *Banks* (1); *Smith* v. *Baker* (2); *Johnson* v. *Lindsay*. (3) No part of the reasoning in the cases upon common employment applies at all to this case. Except *Cribb* v. *Kynoch, Ld.* (4), there is no case of injury to a child where this doctrine has been set up as a defence. It is submitted that that case was not rightly decided. Due importance was not there given to the nature of the contract. The doctrine of common employment does not apply to such a case, and Ridley J. was right to ignore it. It is true that he did so on the ground that it had not been pleaded, but he might have based his refusal to admit the doctrine upon the grounds now put forward.

C. A. Russell, K.C., was not heard in reply.

Cur. adv. vult.

1907. July 4. COZENS-HARDY M.R. The plaintiff in this case, a boy of fifteen, met with a serious accident while working in the defendants' engineering works. His arm was caught by a circular saw. The plaintiff alleges that it occurred through the negligence of the defendants. The jury negatived negligence except on one point. The operation on which the plaintiff was engaged was dangerous, and the jury found for the plaintiff "on the matter of negligence in not instructing him sufficiently in the working of the machine, but not in fencing." The defendants' foreman, in the opinion of the jury, had not fully instructed or cautioned the plaintiff. The defendants desired to raise the point that they were not liable to the plaintiff for the consequences arising from the negligence of their foreman, which was not their negligence. Ridley J. declined to allow this, on the ground that the defence was not pleaded. It was scarcely contended that the learned judge's decision could be supported on that ground, but it was strenuously urged before us that as against an infant workman no such defence can in law be good, and that therefore a new trial ought not to be ordered.

In my opinion there is no justification for the distinction

(1) 4 Times L. R. 324.
(2) [1891] A. C. 325, at p. 336.
(3) [1891] A. C. 371, at p. 382.
(4) Ante, p. 548.

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sought to be drawn between an adult workman and an infant workman. The principle applicable cannot be more clearly stated than it was by Lord Cairns in *Wilson* v. *Merry* (1): "The master is not and cannot be liable to his servant unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. . . . . But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do, and if the persons so selected are guilty of negligence this is not the negligence of the master."

That the nature of the contract varies according to the age of the workman is an impossible suggestion. It cannot be that the master warrants that proper instruction shall in fact be given to an infant workman by competent persons, whereas he only contracts with an adult workman that he will employ competent persons whose duty it shall be to give proper instruction. But although the nature of the contract cannot vary, I do not doubt that the method and extent of the instruction required may vary according to the age and known disabilities of a workman. A written notice or warning might be "proper" and sufficient instruction in the case of a fairly educated man, but would not be "proper" and sufficient instruction in the case of a man who could not read. In like manner a boy may require more full and more careful instruction than an adult. It was argued that the whole doctrine rests upon the theory or assumption that the workman contemplates risks from the negligence of his fellow-workman, and agrees that his master shall not be liable for such negligence, and that an infant cannot thus agree. I cannot assent to this view. A contract of service is regarded as beneficial to an infant; and it is no objection that the contract contains stipulations and provisions usual in the particular trade, and such as a master may reasonably impose

(1) L. R. 1 H. L. Sc. 326, at p. 332.

as a protection to himself: *Leslie* v. *Fitzpatrick*. (1) There can be no legal difficulty in implying as one of the terms of the contract a stipulation which, if the contract were expressed in writing, would be free from objection. In other words, an infant can enter into a contract of service upon the usual reasonable terms upon which alone the master will employ him.

I do not think it necessary to refer to the authorities which are most elaborately discussed in the recent judgment of the Divisional Court in *Cribb* v. *Kynoch, Ld.* (2)

In my opinion the case must go down for a new trial. If it is established that a competent foreman was employed by the defendants whose duty it was, either by reason of express directions or by reason of directions implied from the nature of his employment, to give proper instruction, regard being had to the plaintiff's age and other circumstances, the defendants will not be liable for the omission of the foreman to give proper instruction. Unless this is established, the defendants will be liable, assuming that, as in the first trial, contributory negligence on the part of the boy is negatived.

SIR GORELL BARNES, PRESIDENT. This is a case of some importance, for one of the principal questions raised is whether the case of *Cribb* v. *Kynoch, Ld.* (2), in which the judgment of the Divisional Court was given on May 15, 1907, was rightly decided. The plaintiff, a boy of fifteen years of age, by his father as next friend sued the defendants in a common law action for damages for injury alleged to have been sustained by him owing to the negligence of the defendants. He was at the time of the accident to him on February 19, 1906, in the employ of the defendants at their works at Chelmsford, and while at work at a small circular saw his sleeve was caught by the saw, and he was injured. The two points made for the plaintiff were that the machine was not properly fenced, and that the plaintiff was not sufficiently instructed in the working of the machine. The jury found "for the plaintiff on the matter of negligence in not instructing him sufficiently in the working of the machine, but not in fencing," and awarded 105*l.* 5*s.* 6*d.* damages. The defendants' counsel

(1) (1877) 3 Q. B. D. 229. (2) Ante, p. 548.

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contended at the trial that if the negligence was in not giving sufficient instruction it was the negligence of the defendants' foreman, and that therefore the plaintiff could not recover. Ridley J., before whom the case was tried, declined to direct the jury on this question, on the ground that the point was not taken in the pleadings. In my opinion the point was open to the defendants on the pleadings, when they are fully considered, and should have been disposed of at the trial. But the question mainly argued on this appeal was that, even assuming the point was open, the defendants could not avail themselves of it, because the plaintiff was an infant, and the defendants had a duty towards him to instruct him properly, and were liable for the negligence of the plaintiff's fellow-servant, whose duty it was to instruct the plaintiff, if he failed to perform that duty properly. The plaintiff's counsel endeavoured to distinguish the position of the plaintiff as an infant from what it would have been had he been an adult, on the ground that he could not agree to take the risk of negligence on the part of a fellow-servant. It seems clear from the evidence and finding of the jury that the machine was not a dangerous machine if properly used, and did not require fencing, and in the following observations I do not propose to consider what are the duties or undertakings of the master with regard to a machine which can be termed a dangerous machine.

Now if the plaintiff had been an adult it would hardly have been contended that, according to the now well-established rule of common law, he could have recovered unless there had been some negligence on the part of the master in selecting incompetent servants, or in omitting to take such precautions as the master ought to take, having regard to the nature of the employment. If a servant enters the employment of a master his rights must depend upon the terms of the contract between them, and, as in most cases nothing is said but to fix the wages and work to be done, the rest of the terms must be implied terms. The principle upon which implied terms in a contract are to be gathered is very clearly stated by Lord Bowen in *The Moorcock* (1), as follows: "I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be

(1) (1889) 14 P. D. 64, at p. 68.

found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

By a similar method the present rule in contracts of service has in my opinion really been arrived at. The first reported case in England in which the matter was dealt with was the case of *Priestley* v. *Fowler* (1), the reasoning, however, in which does not perhaps appear to be so clear as that of Shaw C.J., of Massachusetts, in *Farwell* v. *Boston and Worcester Railroad Corporation* (2), whose judgment in that case has been described (3) as "the most complete exposition of what constitutes common employment," and seems to be the source of the later decisions. It is unnecessary to refer at length to that excellent judgment, but one or two passages may be quoted (4): "The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant"; and (5): "The master, in the case supposed, is not exempt from liability, because the servant has better means for providing for his safety, when he is employed in immediate connexion with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of anyone but

(1) 3 M. & W. 1.

(2) (1842) 4 Met. 49 (the judgment may also be found in 3 Macq. 316).

(3) Per Sir Francis Jeune, President, *The Petrel*, [1893] P. 320, at p. 323.

(4) 4 Met. at p. 56.

(5) Ibid. at p. 60.

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himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied."

The reasoning of this judgment has been approved in England and applied to Scotland: see *Barton's Hill Coal Co.* v. *Reid* (1); see also *Wilson* v. *Merry* (2), and especially the judgment of Lord Cairns at p. 332 in the passage referred to by the Master of the Rolls, whose judgment in the present case I have had an opportunity of reading. The matter has not been regarded in the same way in some other countries. In France some writers have considered that it is an implied term of the contract that the master should insure the servant against all accidents in the course of the service and not due to the servant's own fault or vis major: see Pollock on Torts, 7th ed. p. 99, n.

Then does it make any difference that the servant is an infant? I think not, except, of course, that the duty which the master himself would have had to perform towards an adult may be greater in degree towards an infant, as it might also be in other cases where it may vary according to the want of experience, age, and capacity of the servant.

In general a contract of service is for the benefit of an infant, and he can bind himself as an apprentice or enter into a contract of service, though there are cases where the contract is so manifestly to the disadvantage of the infant that he could not be bound by it. If, however, the terms of the contract are of the common kind, and such as the master might reasonably impose for his own protection, and the wages are fair, there seems no reason for implying terms different in kind in the case of the infant from those implied in the contract of the adult: see the cases collected in Simpson on Infants, p. 94.

In *Murphy* v. *Smith* (3) the Court, consisting of Erle C.J., Willes, Byles and Keating JJ., made absolute a rule to enter a nonsuit in a case where the plaintiff, a boy of sixteen years of age, in the defendants' employ, was injured through the negligence of a foreman.

(1) (1858) 3 Macq. 266. (2) L. R. 1 H. L. Sc. 326.
(3) (1865) 19 C. B. (N.S.) 361.

I suppose there are many thousands of persons who have not attained their majority employed in most of the trades carried on in this country, and their relations to their employers are for all practical purposes similar to those of adult servants, and no adequate reason was suggested by counsel for implying different terms according to whether the servant was under or over twenty-one. It was suggested that there was a difference, because an infant could not consent to take the risks of his employment; but this suggestion appears to me to be disposed of on the grounds I have above indicated, that it must be ascertained what the employer has undertaken to be responsible for, and that an infant may enter into a contract of service.

It was further urged for the plaintiff that the rule did not apply where the negligence complained of was in not giving the plaintiff sufficient instruction in the working of the machine, and the case of *Grizzle* v. *Frost* (1) and the Scotch case of *O'Byrne* v. *Burn* (2) were relied on; but the latter case was decided in 1854, and at that time the different positions of the plaintiff and the negligent fellow-servant, who seems to have been considered as a deputy of the master, may have affected the decision. The former was a nisi prius case, in which the contest seems to have been confined to the question of what instructions the plaintiff in fact had. No evidence appears to have been offered to shew that the defendants had exercised due care with regard to providing for the instruction of the plaintiff, and in the summing up the foreman in that case was treated as a deputy of the master instead of a fellow-workman, which is not in accordance with the decision of *Wilson* v. *Merry*. (3)

It is practically impossible for the employers themselves in most works to give the necessary instructions to inexperienced workmen as to the work they have to do, and the mode in which they should do it. It seems unreasonable to imply that the master has undertaken to do so. The result of an obligation on the part of the master personally to instruct might, as Lord Cairns said (in the passage of his judgment above referred to) of the execution of the work, be disastrous to the servant, for he

(1) 3 F. & F. 622. (2) 16 D. 1025.
(3) L. R. 1 H. L. Sc. 326.

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might be incompetent personally to instruct. The master is bound to take reasonable care to select proper and competent persons to give the necessary instruction, but he does not, in my opinion, undertake to be responsible for their negligence any more than he does for the negligence of a superior fellow-servant whose negligence in the actual work causes injury to another servant.

In my opinion *Cribb* v. *Kynoch, Ld.* (1) was rightly decided, and in the present case a new trial must be ordered. I do not think judgment can now be entered for the defendants, as the plaintiff is entitled to try the question whether there has been default on the defendants' part causing the injury to him.

KENNEDY L.J. I have had an opportunity of reading the judgment which has just been pronounced by the Master of the Rolls, and it is needless to re-state the summary of the material facts and of the legal points discussed in the argument before us which is given in the opening sentences of that judgment.

It appears to me that, in accordance with the judgment of Lord Cairns L.C. in the leading case of *Wilson* v. *Merry* (2), the most important passage in which has been quoted by the Master of the Rolls, we may, in regard to the argument put forward by the learned counsel for the plaintiff in the present case, treat as correct the following propositions:—

1. In the absence of a special contract between employer and employed, it is an implied term of the relation that the master undertakes, in the view of the common law, to use reasonable care—(*a*) in the selection of competent fellow-servants; (*b*) in having and keeping his machinery, the use of which might otherwise be dangerous to the servant in his employment, in proper condition and free from defect; and (*c*) where the employment involves the handling by the servant of machinery which, though not defective or less fenced or otherwise protected than is required by statute, or, apart from statute, is reasonably necessary for the safety of the employed, may prove dangerous to the servant unless he is instructed, to take reasonable care to avert that

(1) Ante, p 548. (2) L. R. 1 H. L. Sc. 326.

danger by such instruction as will be sufficient to enable the servant to avoid the danger.

For breach of any part of this implied contract causing injury the master may be held liable to the servant, unless he can shelter himself under the defence of contributory negligence on the part of his servant or a possible application of the maxim "Volenti non fit injuria," as expounded by Bowen L.J. in *Thomas* v. *Quartermaine*. (1)

2. The master does not undertake to indemnify the servant against the consequences of the negligence of any person except the master himself.

In the present case the jury have not found—for no such issue was presented to them—that there was any negligence on the part of the defendants themselves and apart from their servants. They have found that the plaintiff was not instructed as he should have been, and the fault of a foreman in the defendants' service in failing (according to the verdict) to give him this instruction has, through the ruling of the learned judge at the trial, been treated as if by itself such failure necessarily constituted an actionable breach of contract on the part of the defendants, whose servant the foreman, as well as the plaintiff, was at the time. It has been sought by the plaintiff's counsel to justify this ruling upon the ground that the implied contract between an employer and a workman who is an infant differs in nature from the contract between the employer and an adult workman, and that the infant workman cannot be held to undertake the risks which the judgment in *Wilson* v. *Merry* (2) declares to be involved as part of the servant's undertaking in the contract of service.

I share the inability of the Master of the Rolls to find any justification for such a distinction between the rights of an infant and the rights of an adult workman under the implied contract with the employer. I agree with him that the stipulations of this contract cannot be held, as the counsel for the plaintiff invited us to hold, to vary with the age of the workman, so that the duty of the employer in the case of the adult workman to use reasonable care to avert danger in the use of machinery by adequate instruction or other means is transmuted, in the case

(1) (1887) 18 Q. B. D. 685, at p. 697. (2) L. R. 1 H. L. Sc. 326.

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of an infant workman, to a warranty of the employer that he shall be so instructed. The contractual duty of the employer in the two cases appears to me to be identical and invariable. What does, I think, vary, according to the circumstances of each particular case, is the sufficiency of the means adopted by the employer in order to fulfil his invariable duty. Instruction which reaches the standard of reasonable care in the case of an adult might not improperly be held by a jury to be insufficient in the case of a young lad or a girl of fourteen. But youth in the servant is not the only circumstance which has to be considered in regard to the proper discharge of the employer's duty. The degree of mental or physical capacity in the servant may be as important an element as age. A clearly printed notice of warning and instruction might fairly be deemed to discharge the employer's obligation in the case of an educated and reasonably intelligent workman, but it would be of no use to one who could not read. Merely oral instruction to one who was deaf would be obviously insufficient. The inexperience of an adult might require much better and more explicit instruction than the mere youthfulness of an infant who had received some previous training in the factory or workshop.

To sum up: In judging the truth of the master's assertion of the adequacy of means by which he claims to have fulfilled his obligation to use reasonable care in the averting by proper instruction the injury which might otherwise arise to the servant in operations connected with machinery which may be dangerous, the immaturity of the servant, and the mental or physical incapacities of the servant, are points to be considered —much as such immaturity or incapacity has to be considered upon the issue of contributory negligence in actions where the party injured is a stranger, which are discussed by the light of both English and American judgments in Beven on Negligence in Law, vol. 1, pp. 183-192—but the presence of any of these circumstances cannot be treated as effecting an alteration in the nature of the obligation itself, which is, in all cases, to use reasonable care to prevent injury.

There is, I think, only one other question in the case as it was argued before us, and that is this:

If it be the duty of the employer, in order that he may discharge his obligation to use reasonable care in order to prevent injury to his servant in handling the machinery upon which the servant is employed, to instruct him as to the safe and proper method of working, may that duty be discharged by delegating the business of instruction to a competent person—call him foreman or overlooker or what you will—so that, if an injury happens to the servant from the failure of the delegate to give any instruction, or adequate and proper instruction, the negligence causing the injury is, in point of law, the negligence, not of the master, but of the foreman or overlooker, who is a fellow-servant with the injured person?

I agree with the Master of the Rolls that the contractual duty of the master to instruct may be discharged in this manner, and, further, that such delegation may be either an express delegation or implied as a part of the known and recognized duties of the delegate—whether styled foreman or overlooker or anything else—in the course of his service. Whether in the particular case such delegation, either express or implied, existed; whether the directions of the employer, if expressly given to the delegate, were sufficiently precise and explicit; whether the delegate was or was not competent to understand and to fulfil the delegated duty—all these, just as in a case where the employer gives instruction personally or by written or printed notice the adequacy of such personal direction or of the notice, are matters proper for the consideration of the tribunal which, whether judge or jury, has to decide the issue of fact upon which depends the question of the fulfilment or non-fulfilment of the employer's duty to use reasonable care to avert danger to his servant employed about the machinery, and consequently the question of his liability or non-liability for the injury to the servant.

Ridley J., by his ruling in the present case shut out the consideration of all such questions; and as, in my opinion, it was the defendants' right to have the issue of law and fact involved in their defence of "common employment," or, perhaps more correctly, in their defence that there had been no negligence on the part of the defendants, as distinguished from negligence on the part of their servants,

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adjudicated upon, the case must, in my opinion, go down for a new trial.

I deem it unnecessary to refer to the authorities, which were cited before us very fully and carefully by the learned counsel for the plaintiff, because I am prepared to adopt as my own the analysis and review of those authorities which are contained in the considered judgment of the Divisional Court in the recent case of *Cribb* v. *Kynoch, Ld.* (1)

Appeal allowed.

Solicitors for appellants: *Treadwell & Aylwin.*
Solicitor for respondent: *Walter Hilliard.*

G. A. S.

1907 *July* 17.

MARITIME INSURANCE COMPANY, LIMITED *v.* ALIANZA INSURANCE COMPANY OF SANTANDER.

Insurance, Marine—"Whilst, at Port or Ports, Place or Places"—Vessel striking on Reef.

A ship was insured whilst at port or ports, place or places in New Caledonia. Whilst within the geographical limits of New Caledonia, and on her way to a port in that island, she struck upon a reef and incurred losses:—

Held, that the words "place or places," occurring in connection with the words "port or ports," meant place or places at which the vessel might arrive with some object other than that of merely passing on her way to some other point; that the vessel was not, therefore, "at a port or ports, place or places in New Caledonia" within the meaning of the policy; and that the insurers were not liable.

TRIAL of action before Walton J. without a jury.

The action was brought upon a policy of reinsurance to recover a sum of 191*l.* 6*s.* 1*d.*, part of a larger sum paid by the plaintiffs to the owners of the *Dumfriesshire* under a policy of insurance upon that vessel.

The following statement of facts was agreed between the parties:—

1. By a policy of marine insurance dated May 17, 1904, for

(1) Ante, p. 548.

1000*l.* at a premium of six guineas per cent., and a second policy of even date for 500*l.* at a premium of 7*l.* per cent., the said policies being issued pursuant to slips dated April 16 and 20, 1904, respectively, the plaintiffs insured the *Dumfriesshire*, valued at 7000*l.*, against perils of the sea and other usual perils at and from a port in New Zealand to Nehoue, New Caledonia, and while there, and thence to Grangemouth.

2. By a policy of reinsurance dated April 25, 1905, for 500*l.* at a premium of 6*s.* 8*d.* per cent. issued by the defendants pursuant to a slip dated April 25, 1904, the defendants reinsured the plaintiffs in the following terms, "at and from July 1, 1904, until August 31, 1904, both days inclusive or as original whilst at port or ports, place or places in New Caledonia . . . . 500*l.* on hull, materials, &c., valued at 7000*l.* or valued as in original policy or policies being a reinsurance applying to policy . . . . effected with the Maritime Insurance Company subject to the same clauses and conditions and to pay as may be paid thereon."

The said terms were accompanied by certain marginal voyage clauses in print, and a written clause "risk to commence same time as original," and the policy itself was in the printed form of a voyage policy. The words "at and from" which precede "July 1" and the said marginal clauses were in print. The two policies mentioned in paragraph 1 hereof together constituted the original policy in respect of which the said policy of reinsurance was issued.

3. The *Dumfriesshire* on June 1, 1904, sailed from Dunedin for Nehoue.

4. On July 3, 1904, the *Dumfriesshire* while en route for Nehoue was making for Gazelle Passage. After reaching Gazelle Passage, and while passing through it, she struck on a reef, and certain general and particular average losses were incurred. The plaintiffs have paid their proportion of such losses under the policies mentioned in paragraph 1 hereof.

5. Gazelle Passage appears on the Admiralty chart of the north-west part of New Caledonia, a copy of which is annexed to and may be referred to in explanation of this statement. What is marked as Carrey Island, near to Gazelle Passage, on the said chart is an uninhabited patch of sand.

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6. If the defendants are liable under the policy mentioned in paragraph 2 to indemnify the plaintiffs in respect of the plaintiffs' payment mentioned in paragraph 4, the amount for which the defendants are liable is 191*l.* 6*s.* 1*d.*

7. The two policies and slips mentioned in paragraph 1 and the slip and policy mentioned in paragraph 2 are annexed hereto, and may be referred to.

Several underwriters from Lloyd's were called, and gave evidence to the effect that, in their view, in the expression "port or ports, place or places" the words "place or places" had practically the same meaning as the words "port or ports," and meant places for loading, discharging, or calling in the course of the voyage.

J. A. Hamilton, K.C., and *Leslie Scott*, for the plaintiffs.
Scrutton, K.C., and *Mackinnon*, for the defendants.
The arguments of counsel sufficiently appear in the judgment.

WALTON J. The question in this case arises upon the terms of a reinsurance policy by which the liability of the defendants was to attach when the vessel arrived or was at a port or place in New Caledonia. From the admissions it appears that the loss occurred through the vessel striking a reef while passing through the Gazelle Passage, a passage through the outer or barrier reef which surrounds a great part of the mainland of New Caledonia. I assume that the spot where this vessel struck was within the geographical area commonly known as New Caledonia.

If the policy had insured the plaintiffs against loss while the vessel was "at New Caledonia," it may be that in the circumstances of this case the defendants would have been liable; indeed, that liability would follow from the fact that the reef on which the ship struck was in New Caledonia. But that is not the wording of the policy. The words are, "whilst at port or ports, place or places in New Caledonia"; and to my mind the two expressions have not the same effect. Evidence has been adduced as to the meaning of the words "at port or ports, place or places" in a policy such as this is: but the words have not, in my opinion, become a stereotyped expression, so as to have

acquired a customary meaning at Lloyd's; the opinion of underwriters as to the meaning of the words is therefore not evidence, and I must decide their meaning entirely by the light of my own judgment.

Now if it had been intended that the risk should attach as soon as the ship arrived within the limits of New Caledonia and should continue as long as she remained within those limits, it would have been easy to express that intention in plain terms. From the language actually used it is clear that it was not intended that the underwriters should cover risks at every part of New Caledonia. It was intended that their liability should be limited so that it should only attach and continue when and whilst the ship was at some port or place in New Caledonia. I think the words "place or places" are used in order to add something to the meaning of "port or ports." It might well be thought that the word "port" had a somewhat technical meaning, and the words "place or places" are very reasonably added in order to shew that the technical meaning of "port or ports" was not to measure the scope of the defendants' liability. But the words "place or places" are used in connection with "port or ports," and their meaning is affected or coloured by their collocation with those words. Of course a loss happening at New Caledonia must in one sense of the word happen at some place within that island. But the words in this policy, "port or ports, place or places in New Caledonia," do not mean port or ports or anywhere else in New Caledonia; yet the contention of the plaintiffs amounts to an assertion that that is their meaning. It is not easy to give an exhaustive definition of the phrase "place or places in New Caledonia," and I have only to decide whether the loss occurred at a place in New Caledonia within the meaning of this policy. I think that, used as they are in connection with the words "port or ports," the words "place or places" have a meaning somewhat wider than that attributed to them by the witnesses. They seem to me to mean place or places at which the vessel arrives in the course of her voyage for the purpose of loading, discharging, coaling, repairing, or even of taking shelter—in other words, a place to which she has come for some purpose and with some object other than that of merely passing through

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it without stopping on her way to some other point. I come, therefore, to the conclusion that the place where this loss occurred was not a place in New Caledonia within the meaning of this policy. The vessel, though she was in New Caledonia, had not arrived at a port or place in New Caledonia; and therefore there must be judgment for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendants: *Parker, Garrett, Holman & Howden.*

W. H. G.

C. A.

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April 11, 12; *May* 13.

[IN THE COURT OF APPEAL.]

THE KING *v.* THE JUDGE OF THE MARYLEBONE COUNTY COURT AND THE GREAT WESTERN RAILWAY COMPANY.

Ex parte PHILLIPS & CO.

Railway—Regulation—Provisional Order—Demurrage of Trucks—Right of Action for Damages for Detention—Jurisdiction—Great Western Railway Company (Rates and Charges) Provisional Order Confirmation Act, 1891 (*54 & 55 Vict. c. ccxxii.*), *s.* 6.

A railway Act confirming a provisional order, after providing that when merchandize is conveyed in trucks not belonging to the company the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period, enacted that "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party":—

Held, by Vaughan Williams and Buckley L.JJ. (Fletcher Moulton L.J. dissenting), that a claim by a trader for damages sustained by him in hiring a truck in the place of one delayed by the railway company was not in respect of a "difference arising under this section," and might therefore be enforced by action in a Court of law.

Decision of the Divisional Court, [1906] 2 K. B. 426, affirmed.

APPEAL of the Great Western Railway Company from a decision of the Divisional Court (Lord Alverstone C.J.,

Darling and Channell JJ.) (1) making absolute a rule nisi for a mandamus to the judge of the Marylebone County Court to shew cause why he should not hear and determine an action in which Phillips & Co., Limited, were the plaintiffs and the Great Western Railway Company were the defendants. The facts are set out in detail in the judgments of the Court of Appeal, and a brief statement will be sufficient in the present place.

The action was brought to recover 8*s.* 8*d.* for "damages occasioned to the plaintiffs by undue detention of their wagon and cost of hire of another wagon in place thereof." On October 21, 1905, the defendants, at the request of the plaintiffs, sent off an empty truck belonging to the plaintiffs from Loudwater, in Buckinghamshire, to a colliery in Wales to carry a load of coal for delivery to a customer of the plaintiffs at Hampton-in-Arden. The truck was delayed on the journey to Wales and did not reach the colliery until October 30. Meanwhile the plaintiffs had sent the coal from the colliery to their customer at Hampton-in-Arden in a truck which they had hired from the colliery for 8*s.* 8*d.*; this sum they sought to recover from the railway company in the present action. The defendants admitted that they were bound by s. 23 of the Great Western Railway Company (Rates and Charges) Provisional Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxii.), to carry empty coal trucks free of charge to the place where they had been loaded, and also that for the convenience of their customers they were in the habit of sending the empty trucks free to any other place indicated by the customer, as they had done in the present case. They further admitted the delay, but said that 6*d.* a day was, under the ruling of the Railway and Canal Commission in *Charrington, Sells, Dale & Co.* v. *London and North Western Ry. Co.* (2), a sufficient charge for demurrage; they also admitted that 8*s.* 8*d.* was a reasonable charge for the hire of the substituted truck. They contended that the jurisdiction of the county court judge was ousted by s. 6 of the Act of 1891, and that the remedy of the plaintiffs under that section was by preferring a claim for a reasonable sum by way of demurrage for the determination of an arbitrator

(1) [1906] 2 K. B. 426. (2) [1905] 2 K. B. 437.

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appointed by the Board of Trade. The county court judge held this contention good, and struck out the action. The Divisional Court held that the claim was not a "difference arising under this section" within the meaning of s. 6, and that it might be pursued in the ordinary Courts; they therefore made absolute a rule for a mandamus to the county court judge to hear and determine the action.

The Great Western Railway Company, the defendants in the action, appealed.

Cripps, K.C., and *Schiller*, for the defendants. The jurisdiction of the common law Courts is ousted by s. 6 of the Act of 1891, the plaintiffs' claim being a difference arising under that section which could only be determined by an arbitrator appointed by the Board of Trade. *London and North Western Ry. Co.* v. *Donellan* (1) is an authority which supports that contention. That was no doubt a case of a claim by the railway company for damages for delay by a trader in unloading his trucks in the company's sidings, and the dispute arose under s. 5 of the Act; but in his judgment A. L. Smith L.J. dealt with s. 6 at some length and was clearly of opinion that damages for the detention of a trader's trucks was a dispute under s. 6 over which an arbitrator alone would have jurisdiction. The arbitrator has jurisdiction to determine all questions incidental to the differences arising under the section and to make an award dealing exhaustively with the dispute: *Midland Ry. Co.* v. *Loseby and Carnley*. (2) It is apparent from the opinions of the learned law Lords in that case that they approved the view of the section taken by A. L. Smith L.J. The effect of the provisional order as confirmed by statute is to substitute an arbitration for a common law action in all cases of claims for damages for detention of trucks; s. 6 dominates the contract between the parties. It is inaccurate to say, as was said by Lord Alverstone C.J. in the Divisional Court, that s. 5 is more general in its terms than s. 6; they both cover the same ground, the only solid distinction being that s. 5 deals with detention by the trader and s. 6 with detention by the railway company. *Charrington*,

(1) [1898] 2 Q. B. 7. (2) [1899] A. C. 133.

Sells, Dale & Co. v. *London and North Western Ry. Co.* (1) shews that a claim under s. 6 to recover a reasonable sum by way of demurrage includes a claim for detention during transit; and it is pointed out by Bigham J. (2) that it would be an anomaly if a claim at common law and a claim under the statute could exist side by side.

Bailhache, for the plaintiffs. The decision of the Divisional Court was right and should be affirmed. Prior to the Act of 1891 an action at common law would have lain in the present case for damages for breach of contract, and the damages would have been the 8*s.* 8*d.* paid by the traders for the hire of a truck in substitution for the truck detained by the railway company. That right of action has not been taken away by the Act of 1891. It is admitted that it is not taken away by express words, and it has not been lost by the insertion of the word "demurrage" in s. 6. The plaintiffs are not claiming demurrage, and no meaning yet given to that word covers the particular damages claimed in this action. The trader can take one of two courses: he can either charge a reasonable rate of demurrage, which in case of dispute must be fixed by arbitration, or he may sue for damages for detention. The case is analogous to the hire of a ship in place of a ship unduly detained, and the hire of a substituted ship has never yet been described as demurrage. Nor can damages, measured by the cost of the hire of a truck, be described as a reasonable sum "by way of demurrage," though they are a reasonable sum by way of damages for detention.

Schiller, in reply.

Cur. adv. vult.

May 13, 1907. The following written judgments were delivered.

VAUGHAN WILLIAMS L.J. Phillips & Co., of Cardiff, are retail coal merchants who own trucks of their own in which they frequently dispatch coals to customers; these trucks, when they have been unloaded at the station most convenient for the delivery of the coals to the customer, remain upon the railway of the railway company at whose station the coals have been

(1) [1905] 2 K. B. 437. (2) [1905] 2 K. B. at p. 441.

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delivered until Phillips & Co. tell that railway company either to return the trucks empty to them on their premises or tell the company to deliver the empty trucks at some other place where coal can be taken up and loaded for delivery to some other customer. These places where coal is to be taken up and loaded into the truck, or where the coal when loaded is to be delivered, are, of course, not necessarily on the railway of the company at whose station the coal was unloaded from the truck. In the present case the empty truck was somewhere on the railway of the Great Western Railway Company empty, and Phillips & Co. instructed the railway company to send the empty truck to a colliery in South Wales to take up coal, and then to send the truck when loaded on to a place called Hampton-in-Arden, in Warwickshire, for delivery of the coal to a customer there. The railway company failed to deliver the empty truck in accordance with these instructions, and Phillips & Co., in order not to disappoint their customer at Hampton-in-Arden, hired a truck from the colliery company, from whom they (Phillips & Co.) were getting the coal with which they proposed to satisfy the order of their customer at Hampton-in-Arden. Phillips & Co. paid the colliery company for the hire of their truck 8*s.* 8*d.*, and have brought an action in the county court to recover this 8*s.* 8*d.* from the Great Western Railway Company.

The claim, as stated in the particulars on the plaint, was for "damages occasioned to the plaintiffs by undue detention of their wagon and cost of hire of another wagon in place thereof." The railway company say, "Even if we did detain your empty truck as you say we did, and even if this detention compelled you to hire a truck elsewhere at a cost of 8*s.* 8*d.* to enable you to make delivery to your customer at Hampton-in-Arden in accordance with your contract with him, all of which we do not admit, we (the railway company) say that you cannot bring this action in the county court, but must go to arbitration, because by s. 6 of the Great Western Railway Special Act the jurisdiction of the common law Courts is ousted, and the only tribunal which can determine questions arising in respect of your claim is an arbitrator appointed by the Board of Trade." Whether this contention of the railway company is right or not depends upon

the construction of s. 6 of the Great Western Act, and in particular upon the meaning of the words in that section contained "recover a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period." The section is in these words: "Where merchandise is conveyed in trucks not belonging to the company, the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period, either by the company or by any other company over whose railway the trucks have been conveyed under a through rate or contract. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The King's Bench Division have decided the case before them, which was an application for a mandamus to compel the county court judge at Marylebone to hear and determine the plaint against the railway company, holding that s. 6 of the Great Western Act had no application to such a case, and the case before us is an appeal from that decision. I have come to the conclusion that the decision of the King's Bench Division was right and that this appeal fails.

It was not disputed before us but that if the cause of action disclosed by the plaint comes within the words of s. 6, "the trader shall be entitled to recover a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period," the arbitrator alone has jurisdiction to determine every question arising, or incidental to, such claim, but it was argued that the claim in the plaint does not fall within the operation of the section at all. There was nothing, therefore, in the argument of the plaintiffs which controverted in any way the decision of A. L. Smith and Chitty L.JJ. in *London and North Western Ry. Co.* v. *Donellan* (1), which was emphatically affirmed by Lord Macnaghten and the other law Lords in *Midland Ry. Co.* v. *Loseby and Carnely* (2), for those cases only decided that in every case falling within sections using the same words as ss. 5 and 6 of the Great Western Act, the arbitrator had exclusive jurisdiction to determine all questions arising or incidental to such a

(1) [1898] 2 Q. B. 7. (2) [1899] A. C. 133.

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claim, and in no way decided what claims would or would not fall within those sections. I propose, therefore, now to consider the meaning of the words "a reasonable sum by way of demurrage for detention for an unreasonable period."

The word "demurrage," strictly speaking, applies only to a specified rate agreed inter partes to be payable in cases of detention beyond an agreed time of a ship engaged to load cargo or of a chattel bailed to another: see Carver on Sea Carriage, s. 609. The most familiar use of a demurrage clause has been in respect of ships, and in the case of ships there is generally an agreed time for the loading or unloading of the ship, in respect of which time the shipowner receives no payment; then follows a demurrage clause which deals with the sum to be paid to the shipowner for the detention of his ship for a certain number of days after the expiry of the lay days. If the detention exceeds the number of days to which the demurrage clause is limited, then the remedy of the shipowner is by an action for damages for detention of his ship. These damages are absolutely unliquidated, being unaffected by the sum mentioned in the demurrage clause, which is generally a sum per diem; but a jury would generally be directed that, in the absence of special circumstances, they should take the per diem sum mentioned in the demurrage clause as the measure of the damage sustained by the shipowner by the detention of his ship, but not in a case where special damage is claimed: see *Moorsom* v. *Bell*. (1) Such damage may become due in addition to demurrage proper: see Carver on Sea Carriage, s. 609. I should mention here that, although demurrage is often spoken of as if the per diem sum mentioned therein were hire, giving a right to detain the ship for the demurrage days, if that sum was paid, without committing any breach of contract, yet there is authority for saying that the sum therein mentioned is "liquidated damages" applying day by day as compensation for each day's detention within the demurrage period: see *Fletcher* v. *Dyche* (2); but this is doubtful. It is also to be observed that the word "demurrage" is not infrequently used as meaning damages for detention arising outside any agreement. I have said that

(1) (1811) 2 Camp. 616. (2) (1787) 2 T. R. 32.

the word "demurrage" is most familiarly used in respect of ships, but it is very frequently used in respect of wagons: see forms in Bullen and Leake's Precedents of Pleading. I mention all these things because they seem to me material when considering the construction of the words "by way of demurrage."

Whatever "a reasonable sum by way of demurrage" may mean, it cannot mean what it means in a demurrage clause, where the sum payable per diem is only payable, or is only the measure, for a definite number of days; otherwise, in the case where there is no limitation of time, the sum or the measure would apply indefinitely, except where there was malicious conversion, which I think cannot be contended. Of course, if "by way of demurrage" in s. 6 means by way of a payment for a rightful detention, such a detention would necessarily exclude damages for detention; but I have come to the conclusion that these words have not that meaning, and that the reasonable sum for detention of a trader's truck means damages or compensation, for a detention beyond a reasonable period means a wrongful detention. Indeed, counsel on both sides agreed that the words meant damages for wrongful detention, but differed as to the ambit of "damages for wrongful detention." Mr. Cripps, for the railway company, contended that any damages for any wrongful detention came within the meaning of the words "a reasonable sum by way of demurrage for any detention of his" (the trader's) "trucks beyond a reasonable period," and argued that such damages and the questions incidental thereto were intended by s. 6 to be determined by the arbitrator and by no other tribunal. This contention gets rid of the strongest argument urged by Mr. Bailhache, viz., that a common-law right of action can only be taken away by plain words, for the argument of Mr. Cripps, so far from taking away any common-law right of action for damages for detention, asserts that any right of action for damages, however wide the claim may be, can and must be determined by the statutory arbitrator.

But in my judgment the words "a reasonable sum by way of demurrage for any detention" do not cover any damages, special or otherwise, arising from detention for an unreasonable period, because the damages are limited by the words "by way of

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demurrage," which words, in my opinion, limit the damages referable to the arbitrator to such detentions as are dealt with in an ordinary demurrage clause, viz., detentions at a fixed rate per diem; but for the antecedent agreement of the parties the statute substitutes the subsequent determination of the arbitrator. In either case, however, whatever is fixed, be it by antecedent agreement or subsequent award, is a rate per diem. If the section meant that every kind of damage arising from unreasonable detention should be dealt with by arbitration, why say "a sum by way of demurrage"? Some effect must be given to the words "by way of demurrage," which, if every kind of damage for detention was intended to be included, were wholly unnecessary. The effect that I give to these words is that they limit the damages referable to arbitration in the way I have mentioned. I think, therefore, that the judgment of the King's Bench Division was right, and ought to be affirmed.

The section gives to the trader a new right, i.e., a right to a daily sum for his trucks so long as they are detained, even although he cannot prove any definite amount of damage, and there is nothing in such a section to exclude the trader's common-law right to get damages for the detention of his property, and that is what he is suing for in this action in the county court. I think that this appeal should be dismissed with costs here and below.

FLETCHER MOULTON L.J. This is an appeal from an order of the King's Bench Division, directing that a mandamus should go to the judge of the Middlesex County Court holden at Marylebone directing him to hear and determine a certain action brought by Phillips & Co., Limited, against the Great Western Railway Co. in that Court. It appears from the plaint note that it was a claim for 8*s.* 8*d.* for the hire of a truck by the plaintiffs to carry certain coals to a customer. The learned county court judge held that he had no jurisdiction to entertain the claim by reason of s. 6 of the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891. The plaintiffs obtained a rule nisi for a mandamus to compel him to hear and determine the cause, and that rule has since been made absolute

from this decision of the King's Bench Division the Great Western Railway Company, the defendants in the action, appeal. The appeal raises a point of great importance, especially as it is taken as a test case by the parties in order to obtain the opinion of the superior Courts on a point of railway law affecting a vast number of cases.

The first point which must be determined in this case is the precise nature of the claim made in the action in the county court. It purports to be for the hire of a truck to convey certain coal belonging to the plaintiffs to a customer, but it is not pretended that any contract exists which binds the defendants specifically to pay the hire of trucks used by the plaintiffs. The claim is based on the allegation that the defendants detained for more than a reasonable time a truck delivered to them by the plaintiffs for the purposes of a certain contract of carriage, and the plaintiffs contend that they are entitled to recover the sum claimed as damages for this detention of their truck. The cost of hiring the truck actually used by them is material only to the assessment of the damages recoverable for this detention. The plaintiffs contended before the county court judge that it furnishes a proper measure of the damages so recoverable, but in my opinion the question whether or not they were right in so contending cannot affect the question of jurisdiction. It may or may not be the proper method of determining the quantum of the damages due to the plaintiffs for the detention of their truck, but, however that may be, the question of jurisdiction depends on whether the tribunal was entitled to entertain the claim for damages at all, and cannot depend on the principles which should guide it in determining their amount.

There is another point which needs to be mentioned in order to clear the ground and to get to the substance of the case. The claim of the plaintiffs in the action is based solely on the detention of the truck for a longer time than was reasonable for the purposes of the contract of carriage. This detention may well constitute a breach of contract, but it cannot give rise to a claim in tort. There is no suggestion of any detention of the chattel of such a character or for such a purpose as would put an end to

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the bailment and render the defendants liable to an action of detinue. It is simply a claim in respect of the delay in returning the truck, and in no way differs in its nature or incidents from a claim in respect of any other breach of the terms of the contract except so far as the contract itself directs that it shall be otherwise treated. It is this which gives to the case its importance and has induced the parties to treat it as a test case for decision by the superior Courts. In short, the question that we have to decide is the important question whether under the present statutes that relate to this railway (and in fact to all other English railways) a claim in respect of detention of a customer's truck for more than a reasonable time is cognisable by the ordinary Courts of law, or whether it is solely cognisable by the special tribunal of an arbitrator appointed ad hoc by the Board of Trade, i.e., according to present usage, by the Railway Commissioners. (1)

To determine this, we must examine the contract between the parties. It is, in my opinion, a mistake to treat a right to come to the Courts to assess the damages for a breach of contract as being a common-law right. It is no doubt a right which ordinarily arises from the existence of contractual relations. But it does not necessarily arise therefrom. Whether it does or does not depends on the terms of the contract itself. Frequently the fact of the existence of a breach is by the terms of the contract left to some person to determine, as, for instance, where the certificate of an architect or an engineer is made conclusive as to the due execution of a specific work. Again, a contract may itself assess the damages which are to follow from a specific breach by fixing what are usually termed liquidated damages. In such cases the fact of the breach or the assessment of the damages, as the case may be, is no longer the work of a Court of law. The Courts are bound in these matters by the agreement between the parties. In other cases the contract may provide that the determination of damages due shall be by some special tribunal, such as an arbitrator. Such a provision, if it has no higher sanction than the contract itself, is, it is true, of imperfect obligation, since it can only be enforced with the

(1) See Board of Trade Arbitrations Act, 1874 (37 & 38 Vict. c. 40), s. 6.

consent of the Courts. But if it enjoys the sanction of a statute, as in the case of contracts within the Railway Companies' Arbitration Act, 1859 (1), it is enforceable without any such assent, and the Courts are bound to give effect to it and cannot entertain the claim. The question, therefore, whether there is a right to come to a Court of common law to assess damages claimed for breach of a contract turns entirely on what are the provisions of the contract in question and the sanction which those provisions possess.

The terms of the contract with which we are concerned in this case, viz., the contract of carriage made between the Great Western Railway Company and its customer, depend to a great extent on the provisions of the Great Western Railway Company (Rates and Charges) Provisional Order Confirmation Act, 1891, which is one of a series of statutes of identical form which came into force on August 1, 1892, after the general revision of railway rates which took place in 1888—9, and which now regulate substantially all English railways. These statutes did not deal with rates alone. They seriously modified the incidents of the contracts to be made in the future between railway companies and their customers in the cases which were not left to be settled by special contracts. We need not examine generally the provisions of these statutes. We have here to deal only with those portions of the statutes that relate to trucks, i.e., ss. 2, 5, 6, 9 and 23. From the provisions of these sections and the ordinary principles of law applicable to such contracts we must ascertain the terms of the contract between the railway company and its customer, and then decide what were the rights and remedies of the respective parties thereunder. From s. 2 we learn that in the case of articles within Class A (which includes coal) the railway company cannot be required to provide trucks, and the provision of trucks is not included in the charges in the schedule. In other words, the normal contract for conveyance of coal which the company are compellable to make leaves the provision of the trucks to the trader, and it is only when at his request the railway company furnish the trucks that they are entitled to charge for their use. The rule in the case of other

(1) 22 & 23 Vict. c. 59.

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articles is the converse. The company is primarily liable to provide the trucks, and if they are provided by the trader the statutory maxima of the railway charges are to be correspondingly reduced by a sum which in case of difference is to be determined by an arbitrator appointed by the Board of Trade and in no other way.

As the Legislature thus provides that the normal contract of carriage of coal shall include bailment of trucks to the railway company (a bailment which the railway company is compelled to accept) and also contemplates that in innumerable other cases there will also be bailment of trucks to or by the railway company, it is not surprising that it should proceed to regulate statutably some of the more important questions to which such bailments must give rise. Thus, in s. 23 it provides that the railway company shall make no charge for the haulage of the empty truck in cases where the complete journey involves taking it directly back to the place where it was originally consigned to the railway company. But the most important of the questions so dealt with, and the one that concerns us here, is the detention of trucks, a matter necessarily of frequent occurrence in the working of so complicated a system as a railway, and also in the management of the large commercial concerns which have sidings of their own into which the trucks belonging to the railway company are brought to load and unload. This matter is dealt with in s. 5 so far as detention by the trader, and in s. 6 so far as detention by the railway company, is concerned. The language of these sections differs, but this is in my opinion due to the fact that provision for "detention of trucks" is in s. 5 put among provisions for a variety of "services rendered," and the phraseology has been chosen to fit the case of "services rendered" rather than the case of "detention." There is no substantial difference in the nature or scope of the provisions as to detention in ss. 5 and 6. They both deal with circumstances which would have amounted to a breach of the ordinary contract of carriage previous to the Act when it involved bailment; they both provide that the offending party shall pay a reasonable sum for the detention beyond the time reasonably required for the performance of the contract, and they both peremptorily direct

that such sum shall be fixed by a special tribunal, and by that tribunal only. In my opinion, therefore, the provisions are symmetrical as concerns the trader and the railway company, and were intended to be so.

The exact language of s. 6 is as follows: "Where merchandise is conveyed in trucks not belonging to the company, the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period, either by the company or by any other company over whose railway the trucks have been conveyed under a through rate or contract. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." In my opinion the true view of s. 6 is that it is a term which by statute is to be read into, and to form part of, every contract of carriage by a railway company in which the trader provides the truck. Taking it thus, how are we to construe such a term appearing in such a contract? In my opinion there is only one construction to be put upon it, viz., that the parties have contractually provided for the consequences of a breach of the contract by undue detention. Such a breach is to entitle the trader to the payment by the railway company of a sum which is in case of difference to be determined in a particular way. This sum is a sum due to the trader under the contract just as much as the freight or the haulage charge is due to the railway company. This contractual determination of the damages or compensation for this particular breach is as much a part of the contract, and is as binding on the parties, as though it had been fixed in figures therein as liquidated damages. To fix it in figures in the Act was impossible, because the Legislature could not foresee and provide for the infinite variety of cases that might arise. So it did the next best thing. It left the determination of the fact and extent of the breach and the sum to be paid in respect of it to a special tribunal selected for its suitability, and provided that this tribunal, and this alone, should determine them. This term of the contract is not of imperfect obligation, because it has the sanction of a statute. The Courts of law must therefore give effect to it and must leave these matters to the special tribunal.

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Their duty is only that of enforcing payment if necessary of the sum which the special tribunal has fixed.

Realizing the weight of judicial opinion to the contrary both in the Court below and among my brethren here, I have considered very carefully the arguments for the proposition that an appeal to a Court of law to assess actual damage is reconcilable with the existence of this section. I fail to see how it can be. It is settled law that where damages are liquidated under a contract that fact excludes a claim for actual or unliquidated damages. This doctrine does not depend upon the fixing by the contract of the figures of the damages. It is only a particular case of the general rule that, where a contract provides for the damages in respect of a particular breach, the parties are bound in that respect as in all others by the contract they have made and cannot claim otherwise. Such is, in my opinion, the case here, and this view is supported by the circumstance that the Legislature has imperatively directed that the claim under s. 6 shall be adjudicated on solely by the one tribunal mentioned. I presume that the judges in the Court below did not mean that damages could be assessed by the Court in addition to the sum recoverable by the trader under s. 6. Such a division of jurisdiction over damages for the same cause of action would be without precedent, and moreover would render it impossible for the Court to assess the damages until it knew how much the trader would receive under s. 6, since this amount must at all events go in reduction of damages. Their judgment must therefore mean that the two remedies are alternative at the option of the trader. The language of the clause gives no countenance to this. It will be seen that the two remedies (if they exist) are in respect of precisely the same breach, and that the amount to be recovered under s. 6, viz., "a reasonable sum for any detention of the trucks beyond a reasonable time," is prima facie the amount which would be given by a Court assessing damages for such a breach. It is to my mind inconceivable that the Legislature would have taken the serious step of ousting entirely the jurisdiction of the Courts in the assessment of the amount to be paid to the trader for the detention, if it was intended that the trader should be able, at his option, to render the provision

nugatory merely by entitling his claim "damages for detention," even though he would thereunder be seeking to recover the same quantum of damages for the same breach, i.e., a reasonable sum for the detention of his trucks beyond a reasonable time.

The difficulty which seems to have weighed most with those who differ from me in my view of this section arises from the use of the phrase "by way of demurrage" in the section. For my part I think that those words were inserted to make more evident the interpretation which I have given. But they seem to have obscured the meaning of the clause by reason of the fact that the word "demurrage" is best known to our Courts in connection with charterparties, where it usually (but by no means universally) applies to a claim in respect of a limited number of additional days which are taken by the other contracting party in excess of those allowed to him. The word is evidently used here in a sense which differs somewhat from its ordinary meaning in charterparties. This point came up before the Railway and Canal Commission in the case of *Charrington, Sells, Dale & Co.* v. *London and North Western Ry. Co.* (1), which was a claim under s. 6. It was suggested that the words "by way of demurrage" could only refer to delays before the commencement of the transit or after its conclusion, and could not relate to delays in transit. This is no doubt the ordinary meaning of the word in shipping contracts. But Bigham J. decided, and I think rightly, that the word "demurrage" here must be used in a broader sense covering delay during transit, and Sir Frederick Peel, whose familiarity with railway matters was very great, says in his judgment, "The railway company contends that s. 6 has no reference to detention of trucks during conveyance, and that it applies only to detentions at times similar to those at which demurrage would be payable in shipping cases under a charterparty. But demurrage has also the meaning of a payment for any delay or detention, and as between railway companies (as the Clearing House regulations shew) it is in common use to denote the charge which companies have to pay for detention of stock when the time allowed for its transit over their railways is exceeded." I am of opinion that the word

(1) [1905] 2 K. B. 437.

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"demurrage" is used in s. 6 in this broader sense as railways have ordinarily used it. It is quite legitimate to use it thus even in shipping contracts. In an important shipping contract that has more than once come before us of late there is a provision (after fixing the number of lay days), "For any time beyond the period above provided the charterers shall pay to the owners demurrage at the rate of 40*l*. a day," and no one has suggested any difficulty in interpreting the provision, or that the language was inaccurate because the number of days was left unlimited. The essence of a provision for demurrage (whether for a limited number of days or not) is that the delay is made a subject of charge between the parties (usually at an agreed rate) and is not left to depend on proof of actual pecuniary damage resulting from the delay. It is in this general sense that in my opinion it is used in s. 6. The Legislature has thereby extended to traders the same system which the good sense of managers of railways had long previously led them to adopt in their transactions with one another, viz., to regard detention of trucks as a thing to be charged for at commercial rates and not as a matter in which the often impossible task of tracing out its actual results may have to be undertaken in order to obtain redress in damages. This provision of the Legislature is favourable to the trader, for he has no longer to prove actual damage, and at the same time it is just. A man who is trading with the minimum number of trucks ought not to be entitled to recover higher damages from the railway company because even a short detention throws his business into confusion. Nor ought a more prudent trader, who provides himself with a reasonable margin, to be disentitled to recover for detention because by his prudence he has saved his business from injury. The railway company cannot take the private circumstances of its customers into consideration in framing its contracts of carriage and bailment, and they should not affect its liabilities thereunder.

But in this matter we are not left without the guidance of authority. The case of *London and North Western Ry. Co.* v. *Donellan* (1) was a case in which the railway company was proceeding under that portion of s. 5 which relates to a claim for

(1) [1898] 2 Q. B. 7.

the detention of trucks. The Court of Appeal, consisting of A. L. Smith and Chitty L.JJ., in deciding that the arbitrator had full power to decide all things necessary to enable him to fix the charge, went into the question of whether he was the only tribunal empowered to assess the charge. A. L. Smith L.J., in examining the sections of the Act, says with regard to the arbitrator, "I think the statute has said that that is the tribunal, and the only tribunal, which is to settle that difference between the parties"; and Chitty L.J. says, "That at any rate, in my opinion, and that alone, is the tribunal to which the Legislature has by this section relegated the question. I should make the same observations on the 6th section." The case was appealed to the House of Lords, and their Lordships expressly approved the judgment of the Court of Appeal. I am therefore of opinion that we are here concluded by authority; that the charge to be made in respect of detention of trucks either by a trader or by the railway company beyond a reasonable time is a matter that can only be decided in the manner provided by the section, that is to say, by the arbitrator provided by the Board of Trade. It follows that the county court judge was right in holding that he had no jurisdiction in the matter, and that in my opinion this appeal ought to be allowed.

BUCKLEY L.J. During the early part of the hearing I thought Mr. Cripps was right, but as the argument developed I became convinced that he was wrong. Demurrage is, properly speaking, a sum upon payment of which a party is entitled to retain the subject-matter of a contract. It is a contractual sum which may be likened to a rent upon payment of which the retention of possession is legitimate under the contract. It is in no sense damages for breach of contract. One would naturally expect to find that demurrage in the proper sense of the term is contractually payable for some limited time and not for an indefinite time. It is improbable that a person should be entitled to retain possession for all time upon the terms of payment of that which is properly demurrage. The relevant considerations, therefore, upon s. 6 seem to be these: first, that the words are "a reasonable sum by way of demurrage," and, secondly, that there is no

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limit of time named. To this has to be added the fact that the section does not give the company a right to retain the trucks if it pays the demurrage. Upon every view of the section it seems to me that the trader would be entitled to require re-delivery of his trucks, and the only question would be what money payment he could demand from the company. Is he confined by the section to "a reasonable sum by way of demurrage," or could he in appropriate circumstances claim to be entitled to damages for breach of contract?

Sect. 5 is addressed to the case where the trader detains the company's trucks. Sect. 6 is addressed to the case where the company detains the trader's trucks. The language of s. 5 is that the company "may charge for the services hereunder mentioned," and one head (not very appropriately called a service) is the detention of trucks. The charge is to be of a reasonable sum, to be determined by an arbitrator. The language of s. 6 is not identical, but seems to me to be of similar effect; it provides that the trader shall be "entitled to recover from the company" (words equivalent, I think, to the word "charge" in s. 5) a reasonable sum for detention of his trucks, and an arbitrator is to determine any difference. This section adds words which are not in s. 5, viz.: "by way of demurrage." In my judgment the intention of these two clauses is to create in favour of the company in the one case, and of the trader in the other, a right which they respectively would not otherwise have had to make a certain charge. The appellants seek to get out of s. 6 the meaning that the trader shall be deprived of something, viz.: his right to sue for damages for breach of contract if there have been a breach. I cannot find that there are words expressly or by implication to that effect. Suppose the facts were that the trader possessed so many trucks as that the detention of some of them caused him, in fact, no damage whatever; he would, nevertheless, under s. 6 be entitled to recover a reasonable sum by way of demurrage, a sum to be calculated, I suppose, upon the principle that the cost of the truck was so much, that its life is so many years, and that consequently it may be taken to stand at an expense of (say) sixpence a day during its life. This is a matter which has nothing to do with

damages at all. Damages are, I think, a subject-matter to which s. 6 is not addressed. The strongest way of putting the contention in the appellants' favour seems to me to be this—that the effect of s. 6 is to impose upon the trader an agreed measure of damage for every detention, whatever the amount of his damage in fact was. It is in my judgment impossible to say that it has that effect. There is no specific sum inserted in the section, and I am unable to say how a reasonable sum by way of demurrage is to be arrived at upon any principle appropriate to the case of determination of damage. The section is not, I think, addressed to the case of damages at all. It was not wanted to create a right to damages for breach of contract; that existed already. It is not so expressed as to take that right away. Its effect, I think, is to give a right to the payment (damage or no damage) of a reasonable amount, if the company detains the trucks beyond a reasonable time. In my judgment, therefore, the Divisional Court were right in holding, as I think they held, that s. 6 does not cover a case in which the trader is claiming damages for breach of contract. That is plainly what he was doing here. He could not of course sue for the hire of the other wagon, but he could, if my view is right, sue for damages, and the measure of damages might be the expense to which he was put in hiring another truck. I think, therefore, that the order below was right, and that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Burn & Berridge.*
Solicitor for defendants: *R. R. Nelson.*

W. J. B.

C. A.
1907
June 6.

[IN THE COURT OF APPEAL.]

WHEATLEY *v.* SMITHERS.

Auctioneer—Partnership—Bill of Exchange—Implied Authority to accept—Trader.

Appeal of the plaintiff from the decision of a Divisional Court (Ridley and Darling JJ.), reported [1906] 2 K. B. 321.

The action was brought in the City of London Court upon a bill of exchange accepted by the defendant's partner in the firm name, the business carried on by the defendant and his partner being that of auctioneers. The bill was given in payment of the purchase-money of a public-house, and the judge at the trial found that it was accepted in respect of matters outside the partnership business, and gave judgment for the defendant. An appeal to the Divisional Court was dismissed, that Court holding (affirming the judge of the City of London Court) that an auctioneer is not a trader, and that a partner in a firm of auctioneers has no implied authority to bind the firm by his acceptance of a bill of exchange in the firm name. The plaintiff appealed.

A. Cairns, for the plaintiff.
E. G. Palmer, for the defendant.

The Court (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.) said that upon a careful perusal of the partnership deed it clearly appeared that it contemplated the purchase and sale of goods and property as part of the business of the partnership, and that the partnership was in that respect a trading partnership; and, further, that the partnership deed expressly contemplated that bills of exchange would be drawn and accepted in the course of the partnership business. They further held that the purchase in respect of which the bill sued upon was given was in fact a partnership transaction, and that the defendant was therefore liable upon a bill of exchange accepted by his partner in respect of a purchase by the partnership.

They declined to express an opinion upon the question whether, as a matter of law, an auctioneer was a trader, and whether, therefore, a partner in a firm of auctioneers had implied authority to bind the firm by accepting a bill in the firm name.

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Appeal allowed.

Solicitor for plaintiff: *W. J. Smith.*
Solicitors for defendant: *Downer & Johnson.*

W. J. B.

ALLWORTHY & WALKER *v.* CLAYTON.

1906

Nov. 5.

Pawnbroker—Pledge—Neglect to deliver to Pledgor—Reasonable Excuse—Loss of Pledge—Pawnbrokers Act, 1872 (35 & 36 *Vict. c.* 93), *s.* 31.

Where a pawnbroker has lost an article pledged to him, and is therefore not in possession of it at the time the person entitled to have delivery seeks to redeem it, the loss of the article constitutes, in the absence of dishonesty, a reasonable cause within the meaning of s. 31 of the Pawnbrokers Act, 1872, for neglecting to deliver the pledge to the person entitled to have delivery thereof. The pawnbroker is therefore not liable to be convicted of an offence under that section.

CASE stated by a metropolitan magistrate.

At a Court of summary jurisdiction holden at the Old Street Police Court on July 30, 1906, an information was preferred by the respondent Clayton against the appellants, under s. 31 of the Pawnbrokers Act, 1872 (1), charging that they (the appellants) on July 7, 1906, being pawnbrokers within the meaning of the Pawnbrokers Act, 1872, unlawfully and without reasonable cause refused to deliver to the respondent a pledge, to wit a sewing-machine and stand, of the pawn-ticket for which the respondent

(1) Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 31: "If a pawnbroker, without reasonable excuse (proof whereof shall lie on him), neglects or refuses to deliver a pledge to the person entitled to have delivery thereof under this Act, he shall be guilty of an offence against this Act, and a Court of summary jurisdiction may, if the Court thinks fit, with or without imposing a penalty, order the delivery of the pledge on payment of the amount of the loan and profit."

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was then the holder, which she offered to deliver to the appellants, having tendered them within one year of the time when the sewing-machine and stand were pledged the principal sum of 1*l.* and profit, whereby she was then entitled to the delivery of the pledge.

At the hearing of the information the following facts were admitted or proved :—

The appellants were licensed pawnbrokers within the meaning of the Pawnbrokers Act, 1872.

On February 29, 1904, the respondent pledged with the appellants a Singer sewing-machine with its stand for 1*l.*, then advanced by the appellants to the respondent on the security thereof. The Singer sewing-machine was the property of the respondent at the time of the pledge.

The pledge was renewed by the respondent on March 29, 1905, and May 5, 1905, and ultimately on July 8, 1906, the respondent sent her son to redeem the pledge, and he paid to the appellants the amount due to them for principal and interest thereon.

The appellants handed to the respondent's son a Singer sewing-machine with stand, which the respondent returned to the appellants as not being the one which she pledged, and the magistrate found as a fact that it was not the one she had pledged with the appellants. He also found as a fact that the appellants had not delivered to the respondent the sewing-machine pledged by her, and that the respondent was the person entitled to have delivery thereof under the Pawnbrokers Act, 1872. The appellants contended that the sewing-machine tendered by them to the respondent was the machine pledged by her. The magistrate found that the appellants had acted honestly in the matter, but that they had lost the respondent's sewing-machine and were unable to give any account of what had become of it.

There was no evidence tendered that the machine pawned by the respondent with the appellants was still in the possession of the appellants, and the magistrate found as a fact on the evidence of the appellants that it was not in their possession on July 7, 1906, nor had it since been in their possession.

By consent of the appellants, the summons was to be taken as

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having been amended by substituting the word "neglected" for the word "refused," and by two other grammatical alterations.

It was contended for the appellants that they had not neglected to deliver the pledge to the respondent without reasonable excuse within the meaning of s. 31 of the Pawnbrokers Act, as the machine was no longer in their possession, and that, even if they had been negligent in losing the machine, such negligence did not render them liable to be convicted of the offence of neglecting without reasonable excuse to deliver a pledge to the person entitled to have delivery thereof under that section, and also that it was impossible for them to obey an order to deliver up the sewing-machine.

The magistrate was of opinion that the appellants had lost the machine, and were therefore without reasonable excuse neglecting to deliver the machine to the respondent, and accordingly he convicted the appellants, and ordered them to deliver the sewing-machine to the respondent on payment of the amount of the loan and profit. He was unwilling to impose a penalty under the circumstances of the case, inasmuch as there was no wilful neglect on the part of the appellants, and if he had under s. 46 of the Act of 1872 compensated the respondent by imposing a penalty, the penalty would have been necessarily a large sum of money.

The questions for the opinion of the Court were—

(1.) Whether the magistrate was right in law in deciding that the appellants had neglected to deliver the pledge without reasonable excuse;

(2.) Whether he was right in law in ordering the delivery of the pledge when the appellants had not possession of it on July 7, 1906, nor since that date.

C. L. Attenborough, for the appellants. The fact that the appellants were not in possession of the sewing-machine was a reasonable excuse for not producing it within the meaning of s. 31 of the Pawnbrokers Act, 1872. Whatever their civil liability may be, the appellants are not liable under the section to be convicted of a criminal offence: *Shackell* v. *West* (1); *Woodhouse* v. *Jenkins*. (2)

The respondent did not appear.

(1) (1859) 2 E. & E. 326. (2) (1832) 9 Bing. 431.

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LORD ALVERSTONE C.J. I am of opinion that the magistrate ought not to have convicted. He found as a fact that the article was not in the possession of the appellants, and that they had acted honestly. In my opinion the fact that it was not in their possession constituted, under these circumstances, a reasonable excuse for not delivering it up within the meaning of s. 31 of the Pawnbrokers Act, 1872. Whatever the civil rights of the pledgor may be, the appellants cannot upon the facts in the present case be convicted of a criminal offence under the section.

RIDLEY J. I am of the same opinion.

DARLING J. I agree.

Conviction quashed.

Solicitors for appellants: *Attenborough & Sons.*

J. E. A.

C. A.

1907

July 3.

[IN THE COURT OF APPEAL.]

COOPER (SURVEYOR OF TAXES) *v.* BLAKISTON.

Revenue—Income Tax—Office or Employment of Profit—Incumbent of Benefice—Profits accruing by reason of Office—Easter Offerings—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 146; *Sched. E, r.* 1.

Easter offerings given to the incumbent of a benefice as such for the purpose of augmenting his stipend are profits accruing to him by reason of his office, and he is therefore liable to pay income tax under Sched. E in respect of them.

APPEAL from the judgment of Bray J. (1) upon a case stated by the Commissioners of Income Tax.

The respondent, the Rev. D. Y. Blakiston, was the Vicar of East Grinstead, and appealed against an assessment of 56*l.*, made under Sched. E of the Income Tax Acts upon him for the year ending April 5, 1906.

Upon the hearing of the appeal the following facts were proved or admitted.

(1) [1907] 1 K.B. 336.

The said sum of 56*l.* was paid to and received by the respondent, who has been Vicar of East Grinstead for about thirty years, and for eight years has received at Easter sums similar to the sum now in question and popularly known as Easter offerings. Previously to the last eight years a sum was collected for the respondent at Easter time by means of a collecting book.

The greater part of the said sum was received through the collection made by the churchwardens in the parish church on Easter Sunday, but part of such sum consisted of gifts by parishioners and others who were unable to attend the services that day, and other part of such sum consisted of gifts by Nonconformists and other persons, some of whom only attend the respondent's church occasionally, and a few, so far as is known, not at all; some of the said gifts having been sent or handed to the churchwardens privately, and some to the respondent personally. The said collections and gifts are popularly known as Easter offerings, and were made in response to the notices and appeals hereinafter referred to.

In March, 1905, a letter was received by the churchwardens of the diocese of Chichester, including those of East Grinstead, from the Bishop of Chichester, a copy of which was published in the Chichester Diocesan Gazette for April, 1905. The letter is as follows:—

"Allow me to recommend to your favourable notice the laudable practice of making freewill offerings at Easter to the parochial clergy, who are seldom sufficiently endowed. I learn with sincere satisfaction that in response to the appeal made by me last year there has been a marked increase both in the number and the amount of the offerings made. The total sum received by the clergy in 1904 in the diocese was 9249*l.*, an increase of 593*l.* on the previous year, and it is encouraging to find that in rural as well as in urban districts such offerings are now generally made. It is admitted on all hands that the clergy as a body are miserably underpaid, and this is especially the case with those who hold livings depending mainly for income on land and tithes, both being much depressed below their former value, and great hardships are often suffered by those of the clergy who possess little or no private means. In

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these circumstances it becomes the duty as well as the privilege of the laity to do what they can to rectify or mitigate hardship by freewill personal gifts made to those who are labouring amongst them in the Master's cause, and experience has abundantly shewn that churchpeople welcome an opportunity of acknowledging this duty and privilege, and that not grudgingly or of necessity, but as cheerful givers. Now, as it is obvious that the clergy cannot themselves take action in the matter, I ask the churchwardens to be kind enough to take such steps as are necessary, and my request is that the collections in church on Easter Day shall be devoted to the personal use of the incumbent, and this as a personal, non-official, freewill gift, due notice of this being of course given beforehand to the parishioners so that all such gifts may be given on this express understanding."

Upon receipt of this letter by the churchwardens they met together and considered the Bishop's suggestions, and accordingly placed in the pews of the church on the Sunday before Easter and on Easter Day notices in the following form, which had been suggested by the Bishop:—

"St. Swithun's Church, East Grinstead.

"With the sanction of the Bishop of the diocese and to meet the wishes of the congregation, the collections to be made on Easter Sunday, together with any further sums that may be sent to us, will be handed to Mr. Blakiston for his personal use as a freewill offering to him personally, and all sums given in the collection or sent to us afterwards will be given and sent on that understanding only."

The churchwardens intended and wished it to be understood that the contributions were to be a freewill gift to the respondent personally. The respondent had no legal claim or right to call for any such contributions or such collection.

The people's churchwarden was called before the Commissioners, and, in cross-examination, he stated: "The churchwardens enter the amount into a book kept for the purpose in the vestry. If the vicar misconducted himself I should not be a party to giving him the offerings. The offerings are freewill as an acknowledgment for his good work and the esteem in which he is held. The

good work he does is the work of a vicar, but his compulsory work might fall far short of what he does. As he is so zealous, and on account of his popularity, we make a collection at Easter as a freewill gift for his personal use." In re-examination he stated that, notwithstanding the Bishop's letter, he quite understood it was optional on their part as to whether they gave the offerings. The respondent was bound to perform certain duties and was paid for such. There was no obligation to increase his stipend.

The respondent contended that the gift of the said sum was purely personal and a non-official freewill gift made to him as an individual, and not to him as vicar, or by reason of his office, and that the sum was not given in augmentation of his stipend or as a reward for his ministrations, and that the presentation was optional on the part of the churchwardens.

The appellant contended that the Easter offerings were perquisites or profits accruing to the respondent by reason of his office as vicar within the meaning of 5 & 6 Vict. c. 35, s. 146, Sched. E, r. 1.

The Commissioners decided that the Easter offerings of 56*l.* paid in 1905 to the respondent were not assessable and discharged the assessment, but stated this case for the opinion of the Court.

Bray J. affirmed the decision of the Commissioners. (1)

Sir J. Lawson Walton, A.-G., and *Sir W. S. Robson, S.-G.* (*W. Finlay* with them), for the Crown. The Easter offerings in this case are assessable to income-tax, as being profits accruing to the vicar by reason of his office. Such offerings are a regular and ascertained source of income to the incumbent of a benefice. The fact that such income is derived from voluntary contributions is no reason why it should be exempt from income-tax. These contributions are clearly not gifts personal to the incumbent as an individual, but gifts to him virtute officii. The case finds that they were made in response to the appeals thereinafter mentioned, namely, the letter of the Bishop and the notices published by the churchwardens. The burden of the appeal

(1) [1907] 1 K. B. 336.

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made by the Bishop is that the clergy are underpaid, and therefore it is the duty of parishioners to augment the remuneration which they receive for their services. No doubt one consideration put forward in the Bishop's letter is that the clergy are often poor, but the incumbent receives the offerings whether he be rich or poor. They cannot be looked on, therefore, as mere personal charity to the individual. It is obvious that these gifts would not have been made to the vicar unless he had held the office of vicar. [They cited *Inland Revenue* v. *Strang* (1); *Herbert* v. *McQuade* (2); *Turner* v. *Cuxon* (3); *Turton* v. *Cooper*. (4)]

Austen-Cartmell (*Danckwerts, K.C.*, with him), for the respondent. These offerings are not assessable to income tax, not being profits accruing to the vicar by reason of his office. No doubt the vicar would not have received these gifts if he had not been vicar, but it does not therefore follow, as suggested, that he must be considered as having received them by reason of his office, or in his official capacity. It may be admitted that the mere fact that these offerings are voluntary is not per se any reason why they should be exempt from income tax, but it is an element to be considered in arriving at a conclusion as to whether they were given to the vicar qua vicar. If the gifts were a mere accretion to his salary, no doubt they would be taxable; but if they were personal to the individual, although they might not have been given to him but for the circumstance of his holding the office of vicar, they are not taxable. The contributors would obviously be actuated in giving, and as to the amount of their contributions, by the character and popularity or otherwise of the man, and their knowledge of him as a hard-working and devoted clergyman or otherwise. In *Herbert* v. *McQuade* (2) Collins M.R. defines the question with regard to such gifts as being this: "Broadly, are they designed to be gifts to persons who happen to be poor whilst they are in occupation of benefices which are also poor, or are they primarily intended to augment the allotted stipends attached to particular benefices without special personal reference to the incumbent for the time being?" It is submitted that, having regard to

(1) (1878) 15 Sc. L. R. 704.
(2) [1902] 2 K. B. 631.
(3) (1888) 22 Q. B. D. 150.
(4) (1905) 92 L. T. 863.

the nature of these offerings and the terms of the Bishop's letter in response to which they were made, they fall within the first class referred to by Collins M.R. The Bishop's letter refers to the fact that, the clergy as a body being underpaid, great hardships are often suffered by those of them who possess little or no private means, and suggests that in those circumstances it becomes the duty of the laity to do what they can to rectify or mitigate that hardship. In *Herbert* v. *McQuade* (1) no personal element came in, the object of the fund there being merely to augment the incomes of the clergy as such. In the judgment of Stirling L.J. in that case the learned Lord Justice gives this as the test of liability to income tax in such cases: "I think that a profit accrues by reason of an office when it comes to the holder of an office as such—in that capacity—and without the fulfilment of any further or other condition on his part." He may no doubt in using those words have had in his mind such a condition as existed in *Turner* v. *Cuxon* (2), where it was a condition of a grant to a curate that he should have procured subscribers to a certain amount to the society making the grant, but it is submitted that his observations were not intended to be limited to such a condition as that, but to extend to all cases in which other conditions than the mere holding of the office are necessary to obtaining the gift. [He also cited *Poynting* v. *Faulkner*. (3)]

Sir W. S. Robson, S.-G., for the Crown, in reply.

Lord Alverstone C.J. I come with very great regret to the conclusion that the Crown is right in this case, and that the respondent is assessable to income tax as claimed. I feel this regret, because I know that the burdens thrown upon the clergy in respect of rates and taxes upon their income are greater in proportion to the amount of that income than those imposed upon any other members of the community; and I confess, therefore, that I should have been glad if I could have seen my way to holding that the clergy are not liable to income tax in respect of the receipt of such offerings as are here in question.

(1) [1902] 2 K. B. 631. (2) 22 Q. B. D. 150.
(3) (1905) 93 L. T. 367.

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Lord Alverstone C.J.

I have, however, for reasons which I will proceed to give, come to the conclusion, though with diffidence, because I am differing from the judgment of my brother Bray J., that the sums received by the respondent as stated in this case come within the words of s. 146 of the Income Tax Act, 1842. Those words are as follows: "The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Schedule E, or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions." Those words are very general, and are of necessity made so because it is intended in a taxing Act not to let persons escape taxation by reason of special facts in respect of which it was not meant that there should be an exemption from taxation, and to prevent distinctions being drawn which would lead to an evasion of the tax. In the first place I will assume for the purposes of my judgment that the Easter offerings in this case were absolutely voluntary and freewill offerings, and that there was no obligation on anyone to contribute to them; and I think it must be taken that the letter of the Bishop, which is set out in the case, was the basis upon which these contributions were made. In one sense I accept the view of the respondent's counsel that these offerings were personal gifts to the vicar, that is to say, in the sense that they were given to him for his personal use; but it is obviously impossible, I think, to say that they were personal gifts to him in the sense that they would have been given to him if he had not been vicar of the parish. It is to be observed that Bray J., at the close of his judgment, while holding that the purpose of these contributions was a personal gift to the vicar, himself says that it was no doubt a personal gift to the vicar as vicar. While, therefore, I accept the view that these offerings were personal gifts to the vicar in the sense that they were meant to be used for his personal purposes, I think that they cannot be regarded as mere personal gifts to him as an individual; and, in my opinion, the circular of the Bishop imports that they are not to be so regarded, because, as has been pointed out, the

main motive put forward therein for making these offerings appears to be indicated by the passages in which the Bishop speaks of the parochial clergy as being seldom sufficiently endowed, and says that they are, as a body, miserably underpaid. Having regard to the terms of that letter, and the other facts in the case, I think it must be taken that these offerings were voluntary offerings made to the vicar, not as an individual, but as vicar, and received by him as vicar; and under these circumstances I think they come within the words of the statute.

Then do the authorities assist us in arriving at a conclusion one way or the other in this matter? Personally I think that a clear line of distinction may be drawn between the decisions where there was held to be a liability to be taxed, and those where the contrary was held, which shews on which side of the line this case falls. It may be that, as suggested, in *Herbert* v. *McQuade* (1) Collins M.R. only indicated a limited approval of the decision in *Inland Revenue* v. *Strang* (2), and in *Turner* v. *Cuxon* (3) Lord Coleridge C.J. indicated his dissent from that decision, but the observations of Collins M.R. in *Herbert* v. *McQuade* (1) really shew that the principle upon which the decision in *Inland Revenue* v. *Strang* (2) was based was not dissented from in this Court. That principle was put by Lord Curriehill in *Inland Revenue* v. *Strang* (2) as being that, where a payment, though voluntary, is made to a clergyman as such, and is received by him in respect of his discharge of the duties of his office, he is liable to income tax in respect of it. It seems to me that that principle runs through the subsequent decisions on the subject, and indicates the test which ought to be applied for the purpose of endeavouring to solve the question whether a particular payment to a vicar is assessable to income tax or not. We find that principle recognized by Collins M.R. in *Herbert* v. *McQuade* (4), where he says: "Undoubtedly these facts give rise to very nice considerations; and the question is on which side of the line this particular augmentation falls. If, as the respondent contended, it was in fact a gift personal

(1) [1902] 2 K. B. 631, at p. 648.
(2) 15 Sc. L. R. 704.
(3) 22 Q. B. D. 150.
(4) [1902] 2 K. B. 631, at p. 641.

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to himself, I do not think that it would fall within Sched. E; if, on the other hand, it accrued to him by virtue of his office of incumbent, the respondent himself could hardly dispute his liability." Then, after discussing the facts, he says (1): "We are, therefore, brought to the narrow dividing line, which I have already indicated, and we must see on which side of it this particular case falls. We can only determine that by studying the constitution of the society, and the principles which it has laid down for its guidance in making these grants or augmentations. Broadly, are they designed to be gifts to persons who happen to be poor whilst they are in occupation of benefices which are also poor, or are they primarily intended to augment the allotted stipends attached to particular benefices without special personal reference to the incumbent for the time being?" No one can doubt that what one may call the personal equation of the incumbent for the time being would affect the amount given, but it would not affect the basis or principle on which the payment was made to him. Therefore we have to ask ourselves whether the gift falls within the class of gifts made to persons who are poor whilst they are in the occupation of benefices, or of gifts primarily made for the purpose of augmenting the stipend of a benefice. Having recognized that as being the test, the Master of the Rolls says further on (2): "The incumbent's counsel lay stress on the word 'accrue,' and say that, when that word is considered in its technical sense, a payment of this kind, made under an organized scheme for improving the emoluments of certain benefices, cannot be said to accrue to the incumbent by virtue of his office. For what other reason, or in what other respect, does it come to him? It comes to him only because he is the incumbent for the time being of a parish that is inadequately provided for, and it seems to me that such a payment falls directly within the words 'accruing by reason of such office.'" In the present case there is, on the one hand, no suggestion of personal poverty, and, on the other hand, I think we must take it that these offerings have been made in obedience to the suggestion in the Bishop's

(1) [1902] 2 K. B. 631, at p. 642.

(2) Ibid. at p. 647.

letter, which points to their being made in respect of the inadequacy of the remuneration paid to the clergy. Further on, while dealing with the case of *Turner* v. *Cuxon* (1) and pointing out that it was distinguishable from the case then before the Court, the Master of the Rolls said (2): "The one case is well on one side of the line; the other is equally well on the other side. In the one case there is a gift, not in the sense of an eleemosynary donation at all, but an augmentation of a benefice made under an organized system for augmenting benefices irrespective of persons: in the other case a personal eleemosynary gift to a meritorious curate, which was none the less a personal gift because he happened to be the curate of the parish." The respondent's counsel suggests that these observations only indicate that the facts in the particular case of *Herbert* v. *McQuade* (3) shewed that it fell on one side of the dividing line, and do not lay down any principle by which the present case can be made out to fall within the same rule. I think, however, that the Master of the Rolls did lay down a principle which applies to the present case. I will also in this connection refer to a passage from the judgment of Stirling L.J. in the same case upon which the respondent's counsel relied. He said (4): "I think that a profit accrues by reason of an office when it comes to the holder of an office as such—in that capacity—and without the fulfilment of any further or other condition on his part." I rather agree with the respondent's counsel that the latter words of that passage may have a wider application than a mere reference to the fulfilment of such a special condition as existed in *Turner* v. *Cuxon* (1), namely, an obligation to obtain donations to a society of a certain amount. But, however wide a meaning is given to those words, the broad question, as it was put by Stirling L.J., is whether the profit accrues by reason of the office, and it so accrues when it comes to the holder of the office as such. In the case of *Poynting* v. *Faulkner* (5), where the grant to a minister there in question was held to be taxable, Collins M.R., again

(1) 22 Q. B. D. 150.
(2) [1902] 2 K. B. 631, at p. 648.
(3) [1902] 2 K. B. 631.
(4) Ibid. at p. 650.
(5) 93 L. T. 367.

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following out the same view as that taken by him in *Herbert* v. *McQuade* (1), said that, when the grant is an augmentation of the stipend, and nothing else, which enlarges the sum paid to the minister for his services as minister, it is taxable, but that "there may be other balancing circumstances which will make the personal equation of the minister so predominant over other considerations of the congregation that, in a particular case, if there were a series of facts pointing all in that way, they might suffice to turn the balance in the direction of making it a personal gift to the minister and not part of the stipend in return for services to be rendered." These are all cases in which the principle has been applied that sums which are paid to and received by the holder of an office as such are profits accruing by reason of the office, and as such assessable to income tax.

I now turn to the cases on the other side. In *Turner* v. *Cuxon* (2) Lord Coleridge C.J. decided against the taxability of a sum of money granted to a curate. Suffice it to say with regard to that case that there was, in my judgment, abundant evidence that the grant was made to the man personally. He might not have received it unless he had been a curate at the time, but, passing by the coincidence of his being a curate, it seems to me that the ratio decidendi, as Lord Coleridge C.J. put it, was that it was "not given to him as being curate of this parish, but as a donation, honoris causa, for having worked hard during fifteen years without reproach." When dealing in that case with the case of *Inland Revenue* v. *Strang* (3) Lord Coleridge C.J. said that there the payment was made to the minister by his parishioners in return for, and as an acknowledgment of his services in the parish. So that he was undoubtedly drawing a distinction from that case in favour of the person sought to be charged in *Turner* v. *Cuxon*. (2) With regard to the case of *Turton* v. *Cooper* (4), I feel some doubt whether I should have come to the same conclusion as was there arrived at; but it is clear, I think, that it must be taken to have been decided as it was by Channell J. on the ground that the money in question

(1) [1902] 2 K. B. 631.
(2) 22 Q. B. D. 150.
(3) 15 Sc. L. R. 704.
(4) 92 L. T. 863.

would not have been paid to the incumbent there unless he had been poor. There were, however, findings in the case which make me doubt whether, on a strict application of the principle deducible from the authorities, the decision was right, because there was a finding that the money in question was paid to the incumbent as incumbent. I think that decision must be treated as having turned on the particular facts which there existed, Channell J. thinking that on those facts the case came within the distinction drawn by Collins M.R. in *Herbert* v. *McQuade* (1) between that case and *Turner* v. *Cuxon* (2), and that it fell on the same side of the line as the latter case.

I do not draw any distinction based on the manner in which the payments in this case were made. It appears that some of these moneys were collected in church, some were sent to the churchwardens, and some to the respondent personally. But I think they must all be treated as standing on the same footing as Easter offerings, for the case finds that "the said collections and gifts are popularly known as Easter offerings, and were made in response to the notices and appeals hereinafter referred to." That being so, I do not think that any distinction can fairly be drawn between the sums sent direct to the incumbent, or those sent to the churchwardens, and those which were collected in church. I need scarcely say that in some other case it might be that sums were sent direct to the incumbent of a parish under such circumstances as to shew that they were in the nature of a mere personal gift to him, but in this case the sums so sent must be treated as Easter offerings sent to him as vicar. I come, therefore, to the conclusion that, though these were freewill offerings, and were properly applicable by the vicar to his personal wants, they were received by him, and given by the contributors to him, in his capacity of vicar. The amount of the offerings would very likely be larger if he was popular, and if he was hardworking, or by reason of the contributors knowing that he was underpaid, but still I think the offerings must be considered as profits accruing to him by reason of his office.

For these reasons I think the appeal must be allowed.

(1) [1902] 2 K. B. 631, at p. 648. (2) 22 Q. B. D. 150.

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FLETCHER MOULTON L.J. This case, in my opinion, will go further than any which has preceded it, if we hold, as I think we must, that the sums here in question are assessable to income tax. Even in *Inland Revenue* v. *Strang* (1), which is the nearest to the present case as regards the facts, there was, apparently, a definite sum of 100*l.* paid at Christmas to the minister, and I gather from the fact of the amount being fixed that, though this payment could not have been claimed by him as of right, there was a reasonable expectation that he would receive it as part of the emoluments of his office. What makes the present case so difficult to my mind is that the sums in question were contributed pro hac vice for the specific purpose of being given to a known person. Of course that known person is known by the contributors both as an individual and as the occupier of an office. If these sums can properly be said to come to him in virtue of his holding the office, then upon the cases he is assessable to income tax in respect of them. If, on the other hand, they come to him as an individual, and are in the nature of personal gifts to him, he is not so assessable. When sums of money are given in this way for the purpose of being handed over to an individual holding an office, it undoubtedly must often be very difficult to decide whether they are in the nature of personal gifts or of emoluments of office. In drawing the line between the two classes of increments to the ordinary receipts of the person sought to be charged, the Court must, I think, be guided by the circumstances under which the sums in question were contributed. Here I find that they were contributed under the name of Easter offerings. I cannot shut my eyes to the fact, though it does not, perhaps, appear very clearly from the statements in the case, that Easter offerings are a well-known and widely-recognized form of contribution to the emoluments of the clergy. We all know that, in giving particulars with regard to a benefice, it is frequently the practice to state what is the stipend and what the average amount of the Easter offerings. But, apart from that, it appears from the case that these offerings were collected on an organized system, inaugurated by the

(1) 15 Sc. L. R. 704.

proper ecclesiastical authority, for it is stated that collections of such offerings were established in response to a letter from the Bishop, which was obviously sent to all the parishes in the diocese. Another important circumstance is that, substantially, though not exclusively, these offerings were collected by means of a collection in the church made by the churchwardens, and they passed through the churchwardens' hands to the incumbent. The fact that these sums are raised by a collection in the church for the purpose of being handed over to a particular individual, namely, the incumbent, is, in the absence of anything to the contrary, strong evidence, I think, to shew that they were intended to be given to that individual as holding the ecclesiastical office of incumbent of the benefice. Even where the offerings were not collected in church, they appear in many cases to have been sent to the churchwardens as Easter offerings, thus putting them in the same position as if they had been collected in church. These facts induce me to think that, from the givers' point of view, these contributions were really gifts to the holder of the office, and not personal gifts to the incumbent as an individual, though of course the quantum of them would be influenced by the givers' knowledge of the person who would receive them. But I think one ought also to consider the nature of these offerings from the point of view of the receiver of them. In *Herbert* v. *McQuade* (1) Collins M.R. said, with regard to *Inland Revenue* v. *Strang* (2): "Now that judgment, whether or not the particular facts justified it, is certainly an affirmation of a principle of law that a payment may be liable to income tax, although it is voluntary on the part of the persons who made it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it." In this case I feel satisfied that the acceptance of these Easter offerings by the incumbent was the acceptance of something which came to him by virtue of his office, and that he did not look upon it as a matter of personal charity; that he accepted them, I will not say as of

(1) [1902] 2 K. B. 631, at p. 649. (2) 15 Sc. L. R. 704.

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right, but as having been earned by his work as incumbent. So the circumstances both of the collection of these offerings and their acceptance by the incumbent point to their being official rather than personal, and are in my mind sufficient to turn the scale, and to render it our duty to hold that they were profits accruing to the respondent by reason of his office.

I find in the case a statement that some of these sums were not collected in church, and did not pass through the hands of the churchwardens, but were sent direct to the vicar; and it was argued that these sums at any rate must have been accepted by the incumbent as gifts from the persons sending them to him personally. The passage in the case to which the Lord Chief Justice has called attention appears to me to relieve us from considering further the position of those gifts, because we find it stated that they formed part of the Easter offerings and were made in response to the notices and appeals referred to in the case. I will therefore say no more about them, except this: When a gift is made of a sum of money, it certainly lies on the Crown to shew that it is made in such a way and under such circumstances as to be assessable, and I think that a person may undoubtedly give to another, whatever office he may hold, in such a way as to make it a personal gift not assessable to income tax. It would be going much too far to say that, because a person is the incumbent of a benefice, a sum which may be given to him because he is valued and esteemed as such must necessarily and in all cases be regarded as a profit accruing to him by reason of his office, and as such assessable to income tax.

BUCKLEY L.J. In my opinion the Easter offerings, amounting to 56*l.*, which were paid to the respondent in the year 1905 are assessable to income tax. The question for decision is whether they come within the words of s. 146 of the Income Tax Act, 1842, as being profits accruing by reason of his office. In the first instance I put out of consideration certain matters, which appear in the case and have been referred to in the argument, but which to my mind are immaterial. First, it is immaterial that these offerings were made voluntarily. There are many

professions and callings in which income is derived from payments voluntarily made. The question is not what was the motive of the payment, but what was the character in which the recipient received it? Was it received by him by reason of his office? Secondly, it is immaterial that some part of the sum was made up of gifts by Nonconformists, and by other persons of whom some attend the respondent's church only occasionally and a few, so far as is known, not at all. We have not to investigate the motives by which persons were led to contribute to the fund. The question is whether they contributed to a fund which was to go to the vicar as vicar. Thirdly, I think it is immaterial that some of these sums were paid to the vicar direct. The manner in which they were received by him does not matter. The character of these sums is summarized by the statement in the case that "all these collections are popularly known as Easter offerings, and were made in response to the notices and appeals hereinafter referred to." When I look at those documents, I find that the argument used in them is that the clergy are a body of persons who are miserably underpaid, and whose benefices are seldom sufficiently endowed. The Bishop of the diocese by his circular letter impresses upon parishioners that it is their duty, not a legal duty no doubt, but a Christian and a moral duty, to stand in the gap in the case of a body of men rendering services for which they are underpaid, and to add something to their insufficient stipends. There is a passage in the middle of the circular which runs thus: "In these circumstances it becomes the duty as well as the privilege of the laity to do what they can to rectify or mitigate hardship by freewill personal gifts made to those who are labouring amongst them in the Master's cause." I do not think that sentence really contains anything upon which the respondent's counsel can rely in aid of his contention. The question is not whether the motive which led a person to give was that he thought that there was a hardship in the insufficient incomes of the clergy, but whether, in making his gift, he intended to increase the income of the clergyman as such. The fact that the incumbent of the benefice was rich or poor is immaterial, in the sense that, whether rich or poor, he would receive the sum

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given. His poverty or affluence might affect the amount of the contribution; but whether he was rich or poor, he would, by reason of the fact that he was vicar of the parish, be entitled to the amount given whatever it was. The material question is whether the fund came to the vicar as vicar. To answer that question one must look at the scheme under which these offerings were collected as a whole. There was, as has been pointed out, a systematized collection of gifts, initiated by the Bishop of the diocese by means of his circular. These gifts were primarily collected in church, under the auspices of the ecclesiastical authority, as a fund to be handed over to the person who was incumbent of the benefice as such, and were supplemented by sums not given in church, but added to the fund there collected. Everything in the case appears to me to point to the conclusion that the sum collected was to come to the vicar because he was the vicar. It is quite true that the Bishop's letter contains the words "and this as a personal non-official freewill gift." I suppose that the object of those words was to suggest that the gift was not to the vicar as vicar, but to him personally; but I do not think that those words properly represent the scheme which was presented to those who were asked to contribute. I think they were asked to contribute to a collection in church, to be supplemented by gifts made by persons not able to attend, or not attending in church, which was to be handed over to the vicar as vicar and to form part of the profits accruing by reason of his office. For these reasons I think that the Crown is entitled to succeed on this appeal.

Appeal allowed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Hare & Co.*

E. L.

[IN THE COURT OF APPEAL.]

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May 11, 13; *June* 12, 13, 14, 25.

NELSON & SONS, LIMITED *v.* NELSON LINE, LIVERPOOL, LIMITED.

IN THE MATTER OF AN ARBITRATION BETWEEN THE SAME.

Ship—Charterparty—Lay Days—Exception of Sundays and Holidays—Loading done on Holidays by Mutual Consent—Implied Agreement—Despatch Money—Days saved in Loading.

By a charterparty by which ships were chartered for the carriage of frozen meat from the River Plate to Liverpool or London, "seven weather working days (Sundays and holidays excepted)" were "to be allowed by owners to charterers for loading," and for any time beyond that period the charterers were to pay demurrage at the rate of 40*l.* per day; and "for each clear day saved in loading the charterers" were to "be paid or allowed by the owners the sum of 20*l.*" The work of loading a ship under this charterparty was continued during two holidays excepted by the charterparty, but there was no evidence of any express agreement under which the work was so carried on, or at whose suggestion this took place:—

Held, that an agreement between the parties ought to be inferred that the work of loading the ship should be carried on during those holidays on the terms that they should be reckoned as "working days" under the charterparty.

Where under the above-mentioned charterparty the loading of a ship was completed in a number of days less than that allowed by the charterparty as lay days:—

Held, that the charterers were not entitled to despatch money in respect of a subsequent Sunday or holiday included in the period of the lay days, the same not being a day "saved in loading" within the meaning of the charterparty.

So *held* by Vaughan Williams L.J. and Buckley L.J., Fletcher Moulton L.J. dissenting on both points.

Branckelow Steamship Company v. *Lamport & Holt*, [1907] 1 K. B. 787, and *The Glendevon*, [1893] P. 269, approved of.

APPEAL from the judgment of Channell J. in an action brought by Nelson & Sons, Limited, against the Nelson Line, Liverpool, Limited, as after mentioned; and appeal from the judgment of Bray J. upon a special case stated by an arbitrator in an arbitration between the same parties, as after mentioned.

The action arose out of an agreement, made June 18, 1904, in

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the nature of a charterparty, under which steamers of a line belonging to the defendants, called in the agreement "the owners," were to be loaded in the River Plate with cargoes of frozen meat, belonging to the plaintiffs, for carriage to Liverpool or London. Article 6 of the agreement provided that the lay days allowed for loading should commence twelve hours after a notice of readiness to load given to the charterers, or their agents, by the owners, in conformity with certain stipulations in the agreement as to the temperature of the refrigerating chambers in which the meat was to be stored: "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading. . . . . For any time beyond the periods above provided the charterers shall pay to the owners demurrage at the rate of 40*l.* per day, and so in proportion for any part of a day, payable day by day. For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l.*" A cargo of frozen meat belonging to the plaintiffs was loaded under the above agreement at Las Palmas, in the River Plate, on a steamer belonging to the defendants, called the *Highland Heather*, for carriage to Liverpool. The lay days allowed under the agreement for loading her began to run on March 6, 1906. She commenced loading on March 7, and the loading continued on March 8, 9, 10, 12, 13, and part of March 14, when it was completed. March 11 was a Sunday, and March 13 and 14 were public holidays at the port of loading. Beyond the mere fact that the loading was continued on the two holidays, there was no evidence of any express agreement under which the loading was so carried on, nor at whose suggestion this took place. The plaintiffs contended that two days had been saved in loading, in respect of which they were entitled to 40*l.* despatch money under the agreement. The defendants, on the other hand, contended that, loading having taken place on the holidays, they counted as working days, and the number of lay days allowed under the agreement had therefore been exceeded; and that demurrage in respect of fourteen and a half hours, or, alternatively, six and a half hours, had been incurred. The defendants having claimed a lien on the cargo for demurrage under the agreement, the plaintiffs had under protest paid for

six and a half hours' demurrage, and they claimed in the action to recover that amount, and 40*l.* for despatch money.

On the trial before Channell J. he decided that the defendants' contention was correct, and therefore gave judgment for them. (1)

There had been an arbitration under an arbitration clause in the above-mentioned agreement concerning certain matters in dispute between the parties to it, one of which was as follows: It appeared that, in the case of certain ships which had been loaded under the agreement, the charterers, by loading within a less period of time than that given by the lay days, allowed the ship to sail two clear days earlier than the date to which she might have been kept without earning demurrage, but one of such days was a Sunday or holiday, on which the charterers were not bound to work. It was contended by the charterers that they had in fact saved the ship from having to wait two clear days, and were entitled to be paid despatch money for each of those days. Assuming, for instance, that the loading of a steamer under the agreement only took six days, the last of which was a Saturday, the charterers contended that they were entitled to despatch money for two days. The shipowners, on the other hand, contended that the charterers could only for the purposes of despatch money "save" days on which they could require the ship to work, and were only entitled to despatch money for such days, and not for Sundays or holidays. The arbitrator, on the authority of *The Glendevon* (2), held that the shipowners' contention was correct, but stated his award on the matter in the form of a special case.

The case came on for hearing before Bray J., who affirmed the decision of the arbitrator.

Isaacs, K.C., Atkin, K.C., and *Leslie Scott,* for the plaintiffs. Under the agreement Sundays and holidays are excluded from the term "weather working days," which means working days on which the weather permits the work to be carried on; and consequently the period fixed for loading under the contract is seven "weather working days" plus Sundays and holidays.

(1) [1907] 1 K. B. 788. (2) [1893] P. 269.

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These days cannot count as working days unless by a fresh agreement that they shall do so. Loading is a joint operation to be performed by both charterers and shipowners. The question is whether, work in loading the ship having been, in fact, by the consent of both parties, done upon holidays, and there being no evidence of any express agreement on the subject, an agreement may be implied that the original contract shall be altered, and that those holidays shall be treated as working days so as to shorten the period for loading. Such an agreement ought not to be implied unless the implication is from a business point of view a necessary one: *The Moorcock*. (1) There is no ground for inferring any such agreement. The only agreement which can be implied in law is an agreement by one party to work in consideration of the other party agreeing to work. There is abundant consideration for such an agreement, it being to the advantage of the shipowners to get the work of loading accelerated so that their ship may be free to sail as soon as possible, and to the advantage of the charterers to get on with their work so as to ensure themselves against having to pay demurrage. The case of *Branckelow Steamship Co.* v. *Lamport & Holt* (2) is distinguishable, for in that case the charterers requested the captain to begin the loading, and there were negotiations from which Lord Russell of Killowen inferred an actual agreement, but in this case there was no such evidence. They also cited on this point *Houlder* v. *Weir* (3); *The Katy* (4); *Whittall* v. *Rahtken's Shipping Co.* (5); *Nielsen* v. *Wait* (6); *Commercial Steamship Co.* v. *Boulton* (7); *Yeoman* v. *Rex.* (8) With regard to the point raised in the case stated by the arbitrator, the reasonable construction of the agreement is that despatch money is to be paid by the shipowners for days which are saved to the ship by reason of despatch in loading by the charterers. If *The Glendevon* (9) decides to the contrary, it cannot be reconciled with the previous decision of the Court of Appeal in *Laing* v. *Hollway*. (10)

(1) (1889) 14 P. D. 64.
(2) [1907] 1 K. B. 787.
(3) [1905] 2 K. B. 267.
(4) [1895] P. 56.
(5) [1907] 1 K. B. 783.
(6) (1885) 16 Q. B. D. 67
(7) (1875) L. R. 10 Q. B. 346.
(8) [1904] 2 K. B. 429.
(9) [1893] P. 269.
(10) (1878) 3 Q. B. D. 437.

J. A. Hamilton, K.C., and *Maurice Hill*, for the defendants. On the true construction of the contract, if holidays are worked on, they are included in the seven working days allowed for loading, the exception of Sundays and holidays only meaning that the parties shall not be bound to work on those days, and that, if not worked on, they shall not be counted in reckoning the working days. But, if this be not so, the authorities shew that the proper inference to be drawn from the mere fact of work being done on those days is that the parties agreed that the terms of the original contract should be altered by including the holidays so worked on among the working days: see *The Katy* (1); *Branckelow Steamship Co.* v. *Lamport & Holt*. (2) As a matter of fact, it is the reasonable implication to make that the shipowners, when the question arose between the parties whether the work should continue on a holiday, would insist, as a condition of agreeing to work on that day, that the day should count as a working day. It is really immaterial from which party the suggestion that the work should proceed on the holiday emanated.

With regard to the second point, a day which by the terms of the contract is not a loading day cannot be regarded as a "day saved in loading." The decision in *The Glendevon* (3) is in point, and is not inconsistent with *Laing* v. *Hollway* (4), which turned on different language.

Leslie Scott, for the plaintiffs, in reply.

June 25. VAUGHAN WILLIAMS L.J. read the following judgment: —A point is raised in the action between these parties with regard to the exception of Sundays and holidays from the lay days. The contract was contained in a charterparty, and related to the carriage by the defendants, who are therein called "the owners," of frozen meat of the plaintiffs from the River Plate to Liverpool or London, as the case might be. The plaintiffs claim for despatch money due under the charterparty and for the return of a sum of money paid under protest by the plaintiffs to the defendants in respect of demurrage. The material words

(1) [1895] P. 56.
(2) [1907] 1 K. B. 787.
(3) [1893] P. 269.
(4) 3 Q. B. D. 437.

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are: "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading. . . . . For any time beyond the periods above provided the charterers shall pay to the owners demurrage at the rate of 40*l*. per day, and so in proportion for any part of a day, payable day by day. For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l*. The charterers shall be at liberty to send the meat alongside, and the vessels of the line shall receive it by night if required by the charterers to do so, they (the charterers) paying all extra expenses caused to the owners through so doing."

The charterers loaded in the case of the *Highland Heather* on March 13 and 14, although those days were holidays. There was no express agreement, nor was there any evidence as to on whose suggestion, or on what terms, the work was done. The plaintiffs alleged that March 13 and 14 could not count as lay days, and claimed 40*l*. despatch money in respect thereof, and denied that any demurrage had been incurred. The defendants alleged that March 13 and 14 counted as lay days, as they were worked on; they also alleged that the lay days began at 2 a.m. on March 6, and ended at the close of working hours, namely, 6 p.m., on March 13, or, alternatively, that the lay days ended on March 14 at 2 a.m. They therefore claimed that demurrage in respect of fourteen and a half hours, or, in the alternative, six and a half hours, had been incurred on the footing that a day in the charterparty meant a calendar day, and not a period of twenty-four hours. No despatch money, they alleged, had been earned.

Now, there can be no doubt but that the charterers' allowance of lay days is an allowance of seven weather working days, Sundays and holidays excepted, for loading, that is to say, seven weather working weekdays, not being holidays, for loading. It follows from this that, unless some fresh agreement is made, the charterers are entitled to seven working weekdays (not Sundays or holidays) for loading, and that demurrage will not begin to run until the seven working weekdays (not Sundays or holidays) have been exhausted, and the charterers will be entitled to despatch money if the seven weekdays are unexhausted at the date when the loading is completed.

The whole question is, whether any agreement can be found that, if a holiday is worked on, such day must count as a working weekday, that is, as one of the seven days allowed for loading. It is clear that there was no express agreement, and therefore the fresh agreement must be an agreement inferred from the fact that loading was done on these holidays, which could only have been by the acquiescence of the shipowners and charterers.

The decision of Lord Russell of Killowen C.J. in *Branckelow Steamship Co.* v. *Lamport & Holt* (1) is a clear authority that in a case where Sundays and holidays are excepted from the lay days, that is, where the allowance of lay days is an allowance of days which are neither Sundays nor holidays, and the charterers ask the master to allow them to load on the Sunday, and they do so load, it may be fairly inferred therefrom that both parties have agreed to treat that day as a working day, and he says that the same observations would apply to a recognized holiday. Except for the absence of the express request to the master, that case is a distinct authority in the present case, but of course does not bind us in the Court of Appeal. *The Katy* (2) is so far an authority in the present case that it seems to decide that, if lay days are counted according to the calendar, not as periods of twenty-four hours, and if, for the convenience of all parties, a portion of a day not a working day, *i.e.*, a day on which the consignees were not bound to receive cargo, is used, it may be counted as a lay day; and in arriving at this conclusion it followed the decision in *Commercial Steamship Co.* v. *Boulton* (3) in respect of the charterparty of the *Boston*. It is to be observed that in that case the question was whether a portion of a day was to be deducted from the loading time, and the jury found, and were held to be justified in finding, that the time of loading was to be deducted, even though the loading took place in consequence of pressure put upon the charterers by the master. In *The Katy* (2), which was a case of unloading which had to commence, not at a fixed time, but at a reasonable time after the ship arrived, the Court were of opinion that, if nothing had happened on the Saturday, the day when the ship arrived, but on which she was not cleared

(1) [1907] 1 K. B. 787.
(2) [1895] P. 56.
(3) L. R. 10 Q. B. 346; 3 Asp. M. L. C. (N.S.) 111.

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till 10 A.M., when the master gave notice to the consignees of the cargo that the vessel was ready to discharge, the lay days would not have commenced till the Monday, but, nevertheless, as the consignees chose to treat Saturday as an unloading day, Saturday must be treated as an unloading or lay day. The shipowner was not bound to deliver, and the consignees were not bound to receive, on the Saturday; either might have refused, and the consignees did at first refuse; but, instead of waiting until the Monday, the parties came to an agreement involving the waiver by one side of their strict rights, and the unloading did in fact begin at one o'clock in the afternoon of Saturday with the consent of the consignees, possibly owing to considerations as to the nature of the cargo. This is the statement of Rigby L.J. of the nature of the case. He infers an agreement involving the waiver of the strict rights of the parties, and does so in a case in which the consignees, whose strict rights were held to have been waived by unloading on the Saturday, did so at the instance of the master of the ship.

I have no doubt but that an agreement to treat a holiday as a loading day may be inferred from the conduct of the charterers in a case in which the charterers have a right by the terms of the charterparty to a given number of lay days which are not holidays, and I do not think that such an inference is excluded by the absence of evidence as to on whose suggestion, or on what terms, the work was done.

I think that the judgment of Channell J. should be affirmed on this point.

I think that the holidays worked on were rightly counted amongst the lay days.

With regard to the question of the despatch money raised in the arbitration, I agree with the judgment that Buckley L.J. is about to deliver.

FLETCHER MOULTON L.J. read the following judgment :—Two points are raised by these appeals which are of general interest, as relating to rules of interpretation which would affect a very large number of charterparties.

It is asserted, and I think rightly, by the respondents that

there is in respect of each of these points direct authority binding upon Courts of first instance, but which we are entitled to review. If the cases to which the respondents refer us were rightly decided, it is difficult to distinguish the present case from them, and I shall therefore commence by considering these authorities and then pass to the exact case before the Court, in order to discover whether, if I am of opinion that these cases were wrongly decided, there is anything special in the present case which would justify our treating it as an exception.

The two points in question relate to the provisions for loading contained in clause 6. They read as follows, "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading"; and, "For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l*."

In the present case the charterers and the shipowners, though not required to do so by the contract, did, as a matter of fact, work on two holidays, and the ship was loaded within the period allowed by the above provisions; but the respondents claim that, as a matter of law, the Court must presume that the working on the two holidays was in virtue of a contract that those two holidays should be counted as working days, and should be taken out of the period allowed under clause 6, so that the owners are entitled to payment for demurrage, although the ship was in fact loaded within the specified time. There is no pretence that any such contract was in fact made, and, although witnesses (including the captain of the vessel) were called at the trial by the shipowners as to the circumstances of the ship's loading, no questions were asked them as to any terms whatever having been arranged in connection with the conjoint working of the charterers and the shipowners on the days in question. The case for the shipowners, the respondents in this Court, is based on the decision of the late Lord Russell of Killowen in *Branckelow Steamship Co.* v. *Lamport & Holt* (1), and the cases that followed it, and they also contend that the Court of Appeal in the case of *The Katy* (2) laid down the same rule of law.

I am of opinion that the decision in *The Katy* (2) does not

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warrant the interpretation put upon it by the respondents for reasons that I will presently give, but that the decision in the case of *Branckelow Steamship Co.* v. *Lamport & Holt* (1) and the subsequent decisions that followed that case support the contention of the respondents. I propose, therefore, to consider whether they can be supported in law. They lay down that, where a charterer is allowed a certain number of lay days (Sundays and holidays excepted) and work is actually done on the excepted days, the Court must presume, in the absence of evidence to the contrary, that it was upon the terms that these days should count as working days, and that the period allowed for loading should be correspondingly shortened. In my opinion this proposition cannot be supported. It will be observed that the question has nothing to do with the interpretation of the contract contained in the charterparty. By the terms of that document the charterers are allowed a certain period for loading, and that period is calculated in a way prescribed by the terms of the document, namely, that, without counting Sundays and holidays, there are to be a certain number of lay days. This defines the rights of the charterer, and, accordingly, the period allowed to him for loading is fixed from the moment the loading commences, and remains unchanged, unless some extraneous and independent contract between himself and the shipowner be made which takes away these rights; and this proposition is not contravened by the decision under examination. But the decision lays down that the Courts must assume from the fact that work has been done on a day on which neither party was compelled to work that such an independent and extraneous contract of a special form must be presumed to have been made. I can see no warrant for such a doctrine. I quite agree that neither the charterer nor the shipowner could be required to work at the loading of the vessel on any one of the excepted days, and that, if work was done, it must have been done by the mutual consent of both parties. But it is evident that the working on that day might be, and probably would be, to the mutual advantage of both parties. The shipowner would get his ship away a day earlier, which might be of much more importance to

(1) [1907] 1 K. B. 787.

him than any question of demurrage or despatch money, and the charterer would also get forward in his work, and lessen the risk of having to pay demurrage. The consent of the one party to work was abundant consideration for the consent of the other to work, and, in my opinion, where two parties combine to do something which is for their common interest, the law will not, in general, presume, in the absence of proof, that there was any extrinsic consideration moving from or to either party. In cases where the whole of the burden falls on the one party, and the whole of the benefit goes to the other, cases may arise where the law will presume that it was done for an outside consideration, and will bring in the doctrine of quantum meruit or some other analogous doctrine, in the absence of facts shewing that the party taking upon himself the burden did so as a volunteer. Probably the same presumption might be made in a case where the advantage to the one side, and the burden to the other, was so overwhelmingly greater than in the case of the other party that it would be incredible that the matter should not have been one in which some extrinsic consideration was intended to come in. But these must be very exceptional cases. A good example of this principle can, I think, be obtained by considering a case closely analogous to the one before us. Suppose that a charterer has a certain number of lay days under a charterparty. Upon those lay days, in the absence of a specific provision, there would be no obligation upon the shipowners or the charterers to work more than the ordinary working hours. Let us assume that, as a matter of fact, overtime was worked on one or more of those days. Could it be contended that the law would be justified in assuming that a contract was made between the parties that either should pay to the other any sum, or forfeit any advantage, as consideration for working overtime? In my opinion it would be perfectly unjustifiable for the Courts to enter into any speculation on the subject. If a contract was in fact made whereby the consent of the one to working overtime was purchased by something more than the consent of the other to do the like, it must be proved in the ordinary way. For my own part I cannot distinguish such a case from the case now before us. It appears to

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me that there is no legal difference between working during hours when working is not compulsory, and during days when working is not compulsory. In both cases we have concurrence in something which may be, and probably was, to the advantage of both parties, and, if that fact be before the Court and nothing more, there is nothing which can justify the Court in presuming the existence of a contract by which either party agreed to purchase the consent of the other at some hypothetical price which the Court may think a probable one, still less to assume the existence of such a contract in a case where evidence of fact has been called, and not only does not prove, but does not even suggest, the existence of such a contract.

In the present instance, therefore, I can see nothing which justifies our presuming any other agreement than the agreement on both sides to work on a day when neither need have worked. The doing so only increases the burden on either party by the amount of extra inconvenience, if any, in working at the substituted times. It neither affects the amount of work nor the incidence of the cost of working. We are not entitled to balance nicely the probabilities as to whether this was done by either party as a favour to the other, or as promoting its own interests, but, if I were to allow myself to go into the probabilities, I should think it in the highest degree unlikely that the charterers would put themselves to the extra trouble of working on a holiday (when it was probably somewhat inconvenient for them to work) on the terms that the moment when they would become liable to demurrage should thereby be advanced a day. On the other hand, there seems no improbability, in my mind, that the shipowner would be glad to get his ship away a day earlier, even though he would not get demurrage for the day that would otherwise be lost to him, or would have to pay the comparatively small amount of despatch money in respect of a day gained. This is especially true in the present case, for it must be remembered that under the provision of clause 6 a shipowner is liable to have the loading period prolonged if bad weather sets in before it is completed, and therefore a day saved (even though he has to pay despatch

money for it) lessens the risk of bad weather intervening and postponing at his expense the day on which his ship will be free.

I am therefore of opinion that, notwithstanding the fact that work was done on days when neither party was obliged to work, the charterers remained entitled to the full period originally allowed them by the charter for loading, and that in the present case the lien which was insisted upon by the shipowners was wrongfully exercised, and the plaintiffs are entitled to have judgment for the money paid by them under protest.

I will now deal with the case of *The Katy* (1), which properly understood, so far as the decision is concerned, is, in my opinion, in support of the proposition which I have laid down. In that case fourteen running days, Sundays and holidays excepted, were to be allowed to the freighters for loading and unloading. The ship arrived at a port and was ready for unloading about the middle of the day. It is perfectly clear that the charterers might have refused to commence unloading on that day, because they were entitled to fourteen full days, and could not be obliged to take half a day instead of one of those full days. But nobody contested that, if they did take part of a calendar day, that must be counted as one of the running days. Negotiations took place between the parties, and ultimately the charterers agreed to commence unloading in the middle of this day, that is to say, to commence unloading on that calendar day. They then set up that it must be taken that they agreed to unload on that calendar day on the terms that it should not count as a running day. Who had to prove the extraneous contract? Not the shipowners. They said that the charterers began unloading on such a day, and, counting from that day, the time was up at such and such a date. It was the charterers who had to set up an extraneous contract to the effect that, though they did work on that day, it must be taken to be on the terms that it was not to count as a running day. The Court by their finding simply found that there was no such contract. In the absence of such a contract, the charterers were in the wrong, and that is what the Court found. There was evidence as to what took place

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between the parties, and I admit that Lord Esher reviewed that evidence, and came to the conclusion that, taking the evidence actually given, there was an agreement that the day should be counted as one of the running days, but the important passage in the judgment in my view is that at the top of p. 64 in the report, where he says: "Therefore on the Saturday, if they chose to take it as a lay day, they must take the whole of it, and the fact that they did not take delivery until one o'clock does not prevent them from having to treat the Saturday as a lay day." I may say that the principle that the Court is not to hypothesize the existence of contracts, which are not in fact made, by reason of the parties mutually agreeing to do something seems to me to be supported by that case and not to be negatived by it.

The second point is also one of general importance. The period granted by the contract to the charterers for loading was, as I have said, "seven weather working days (Sundays and holidays excepted)." Its minimum length was therefore eight days, though it might be longer. By expedition in working the loading was completed before this period had expired, and we will say that the loading was completed two days before the period expired. The charterers claim 20*l.* for each of these days in accordance with the terms of the charterparty, but the shipowners reply that one of these days was, say, a holiday, and that they are not entitled to be paid for that day. It is of course not denied that the shipowners had the benefit of the ship being free two days earlier than provided by the charter, but it is contended that by the decision of the Divisional Court in *The Glendevon* (1) it was decided that the charterer could not claim in respect of excepted days. I am of opinion that this decision can only be very doubtfully distinguished from the case before us, and that substantially it bears out the contention of the respondents, and the first question therefore is whether that decision can be supported.

In my opinion it cannot, both on the ground that it was wrong in law, and also that the opposite principle had been laid down in a case in the Court of Appeal, namely, *Laing* v. *Hollway* (2), which is binding upon us, and was binding upon the

(1) [1893] P. 269. (2) 3 Q. B. D. 437.

Divisional Court. I will first consider the interpretation to be put upon the provisions in question, apart from the decision in *Laing* v. *Hollway* (1), and for this purpose I will deal first with the more general case (which is less in favour of the charterer) where the number of lay days is specified without any reference to the weather; and I will subsequently consider whether the fact that the days are described as "weather working" days in the present case affects the conclusion to which we ought to come. I shall therefore assume that the language is "seven working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading; and for each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l.*" As in the point with which I have already dealt, we have here a definite period allowed to the charterers for loading, namely, such a period as will contain seven days which are neither Sundays nor holidays. The charterers are entitled to spread their loading over the whole of that period, but, if they perform the loading more quickly, so that the ship is free on an earlier day, they are entitled to despatch money. One would naturally expect that this despatch money would be proportionate to the advantage derived by the shipowners from the extra speed in loading, just as in demurrage the payment is proportionate to the loss of time caused by the dilatoriness in loading: and the language appears to me to be clearly chosen to express this intention. In construing it, we must consider between whom the contract is made, or, if I might use the phrase, who are speaking in the contract. In this case they are the charterer and the shipowner. The shipowner is willing to pay 20*l.* for each clear day saved in loading. That cannot in my opinion refer to the rapidity with which the goods are at any moment put on board, but it must refer to the shortening of the total period occupied by the loading, because it is only by the shortening of that period that the shipowner is benefited. If these words had occurred in a contract between charterers or shipowners on the one part and stevedores, paid by the day on the other part, I can understand that the Court might have put on the words the meaning "each day by

(1) 3 Q. B. D. 437.

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which the time occupied in actually putting the meat on board the vessel is shortened," but then the stevedores would be entitled to their bonus whether they had rendered it unnecessary to work on the first, second, or any other of the working days allowed. Any day saved would have equally relieved their employers from the necessity of paying a day's wages, and might fairly be called a day saved. But such an interpretation would be absurd in a contract between the shipowner and the charterer, where the whole advantage to the shipowner is measured by the extent to which the total period of loading is shortened. I am of opinion, therefore, that this is the meaning of the phrase "each clear day saved in loading," and it makes no matter whether that day is a day on which the parties or either of them could have been compelled physically to put meat on board the vessel or not. If, for instance, the period allowed for loading expired on Thursday evening (Wednesday being a holiday), and by diligence in loading the charterers filled the vessel or completed their work by Tuesday evening, the number of days saved in the total period of loading would be two, and the shipowner, in return for getting his ship free two days earlier, must pay despatch money in respect of each of them.

It further appears to me that this is exactly what was laid down by the Court of Appeal consisting of Baggallay L.J., Bramwell L.J., and Brett L.J., in the case of *Laing* v. *Hollway.* (1) Bramwell L.J., in delivering the judgment of the Court, said: "It is admitted on both sides and is clear that 'time saved' means, if the ship is ready earlier than she would be if the charterers worked up to their maximum obligation only. All the time by which she is the sooner ready is time saved within the meaning of the charterparty." And later on he points out that despatch money and demurrage ought to run exactly in the same way. I am of opinion therefore that, as a general rule, days saved out of the total period allowed for loading must be reckoned in favour of the charterers, whether those days were within the period by virtue of their being working days, or by virtue of their being Sundays or holidays.

If this is so, it remains to consider whether the fact that in the

(1) 3 Q. B. D. 437.

present contract the allowance is more favourable to the charterers in that it is "seven weather working days" prevents the rule applying. This is used in a very ingenious way by counsel for the respondents. It is suggested that the extra two days might have brought the ship into a period of bad weather when the days would not count, and the consequence would be that the number of days saved would be far greater than the two in question. This is treated by the counsel for the respondents as a reductio ad absurdum. Although I agree, for reasons that I shall presently give, that the charterers could not claim in respect of such a possible future prolongation of the term, I cannot say that I feel that there would be anything absurd, if they were held to be so entitled, because the shipowners would even in that case only pay for exactly the time that was saved to them by the diligence of the charterers. Ex concessis, had the charterers taken their full period, they would have been entitled to keep the ship until the end of the spell of bad weather, and the owners would have lost its use for that time. But, although I am of opinion that the shipowners would in fact benefit to this extent, I do not think that it is necessary to interpret the phrase "days saved" as including such possible future prolongations of the period allowed for loading, because I think that the services and the payment for them must be determined at the moment when the ship is freed by the charterers, and put at the disposal of the shipowners, and that the payment must be determined rebus sic stantibus for the services so rendered. Accordingly, the period must be taken as it stood at the moment when the vessel was given over to the shipowners at the termination of the loading, and the charterer must be paid for the unexpired portion. The chances of the future no longer affect him because he agrees that the period of loading shall then terminate with all the rights that it brings with it. His right to payment, therefore, is measured by the number of days by which the period taken falls short of that which at the time he can shew that he was entitled to.

On this point, therefore, I am of opinion that the appeal should also be allowed.

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BUCKLEY L.J. read the following judgment:—The points raised in this case turn upon the true construction of certain provisions in the agreement of June 18, 1904.

The first point arises thus: A ship, the *Highland Heather*, occupied seven days in loading, but two of them were holidays. The charterers claim two days' despatch money upon the footing that the two days are not to be counted. This question turns upon the true meaning of the words in article 6 of the agreement, "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading. . . . . For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l.*"

For the decision of this point it is necessary to determine the true construction of the words "Seven weather working days (Sundays and holidays excepted) to be allowed." To clear the ground, I point out that the words of exception are not by way of exception from the allowance. The excepted days are additional to the allowance. The first words define a certain class of days, and the exception is by way of exception from that class. The phrase means, I think, to express that seven days of a certain quality are to be allowed, but that Sundays and holidays are to be taken as not being of that quality. To express my meaning, I paraphrase the language thus: "Seven weather working days are to be allowed, but Sundays and holidays are to be taken as not being within that category." The same meaning will be expressed, if the words in the brackets be written "(but not including Sundays and holidays)." Next I think that the expression "weather working days" is one in which the words "weather working" are not to be read together so as to mean days on which the weather allows you to work, but that the word "weather," as an adjective, controls the composite noun "working days," so that the expression means "seven working days on which the weather is favourable," or, quite shortly, "seven fine working days." Then "working days," I think, means days on which according to the custom of the port work is ordinarily done. The purpose of the words in the brackets, I think, is to emphasize that idea, and means "in the expression 'working days,' mark you, Sundays and holidays

are not included." This being so, it seems to me that, upon the true construction of article 6, a Sunday or a holiday is excepted, whether work is or is not done upon it. In other words, upon the construction of the agreement of June 18, 1904, I am on this point against the respondents.

At this point it is necessary to add further facts. The cargo was to be supplied by the charterers, but under article 17 the loading was to be effected by the owners at their expense, so that loading required the concurrence of charterers and shipowners. As matter of fact, loading was effected on the two holidays; it must have been done by the common consent of the charterers and the owners. Neither party was bound to load on those days. Which of the two requested, and which assented to, loading on these holidays is not known, and is not, I think, material. From the above facts it is not disputed that an agreement to load on the holidays is to be inferred. The decision in *The Katy* (1) is in point upon this question, and, apart from authority, Mr. Leslie Scott, who replied for the appellants, admitted that the facts were such that some agreement to load on the holidays was to be implied. The question, however, remains, what must be taken to be the terms of the implied agreement? Was it merely an agreement to work on the holiday, or was it an agreement to make the holiday a working day for the purposes of article 6? It is contended that *The Katy* (1) decided that the latter must be taken to be the terms of the implied agreement. In my opinion that is not so. The day upon which the question arose in *The Katy* (1) was not a Sunday or a holiday. The point was that the charterers were invited to begin the unloading when a large portion of a weekday had expired, and that ultimately they did begin the unloading on that day. The decision was merely that by unloading on that day—although late in the course of it—that day was by agreement constituted a working day as to its entirety. That has no bearing upon the question of what would have been the result, if the day had been a holiday, and therefore a day excepted from working. The charterers were entitled to so many working days. The decision is that, by working on a working day which they might have declined to utilize, they

(1) [1895] P. 56.

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constituted it a working day, not as to part of it, but as to the entirety of it. The charterers worked three hours on that working day. A decision to the contrary would have involved that the charterers would have got that three hours on a working day for nothing.

To answer the question what in the present case is the proper agreement to imply, regard is, I think, to be had to the considerations which would reasonably weigh with the persons who were entering into the implied agreement. When the owner was considering whether to agree, he would naturally consider whether it was worth his while to agree, and a relevant consideration would be whether by agreeing he would obtain something for his own benefit. He would do so, if the agreement was that the holiday, on which he agreed to work, should be taken to be a working day within article 6, with the consequence that the ship would be in a position to leave one day earlier without the owner having to pay for the advantage. He would gain nothing, but, on the contrary, would probably be a loser by having to pay higher wages on the holiday, if the agreement were not to that effect. In my judgment we ought to imply that that was the bargain between the parties.

In my judgment, therefore, the two holidays are to be taken to be working days within article 6, not because upon the construction of that article they become such by the act of working upon them, but because the new agreement to be implied from working on those days ought to be taken to be an agreement to treat them as working days for the purposes of article 6. This conclusion is in accordance with the decision of Lord Russell C.J. in *Branckelow Steamship Co.* v. *Lamport & Holt* (1), with which I agree (adding that no difference, in my opinion, arises because in that case the work was done at the instance of the charterers), and in accordance also with *Whittall* v. *Rahtken's Shipping Co.* (2), which followed that case.

The second point arises on the second appeal, and is as follows: Suppose that a vessel begins to load on a Wednesday, and completes her loading on Saturday, thus occupying four days, how many clear days have been saved in loading? The appellants

(1) [1907] 1 K. B. 787. (2) [1907] 1 K. B. 783.

say that they have utilized four out of the seven, and have saved the remaining four. In this lies a delightful touch of humour. It is as if an Irishman were to say that, having only half-a-crown in his pocket, he had spent two shillings of it, and saved the remaining shilling. Of course the appellants do not put their contention in this bald form. They adopt the not uncommon device of forgetting, or seeking to distract attention from, the language of this contract, and arguing that, if the language had been different, that would have been the result. They say, and quite truly, that the departure of the ship has been accelerated, not by three days, but by four, because she got the benefit of Sunday; that the charterers might have occupied until the end of the next Wednesday in loading; and that, had they done so, the ship would have left four days later than in fact she did. If this contract had been that the charterers should have so much a day for each day saved to the ship, this would have been right, but it does not so provide. The provision is that they shall have so much for each clear day saved in loading. The respondents argue, and quite rightly, and pertinently, I think, in the case in debate, that a man cannot save that which he never had. But, according to the common use of the English language, that is not quite accurate, in the sense that it is not exhaustive. I can properly speak of some one as having saved me trouble. The fallacy of the appellants' argument may be indicated by following up this suggestion. By finishing their loading on the Saturday the charterers saved the shipowners delay, but there was no day saved in loading so far as the Sunday was concerned. The relevant words are "seven days to be allowed for loading," and "for each clear day saved in loading" the charterers shall be paid. In this language no trace is to be found of saving delay to the ship. The payment is to be made for any saving effected in the seven days allowed for loading. This conclusion is in accordance with the decision in *The Glendevon* (1), which, in my opinion, was rightly decided. An argument was advanced that that decision was inconsistent with the decision of the Court of Appeal in *Laing* v. *Hollway*. (2) I think not. *Laing* v. *Hollway* (2) has, in my opinion, no bearing upon the point. The

(1) [1893] P. 269. (2) 3 Q. B. D 437.

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NELSON & SONS, LIMITED v. NELSON LINE, LIVERPOOL, LIMITED. THE SAME, *In re.*

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point in that case was, that 10*s.* an hour was allowed on any time saved in loading. The charter provided that the cargo should be shipped at the rate of 200 tons per running day. The cargo was 1800 tons, and it thus resulted that nine days would be the time within which the cargo was to be shipped. The loading was completed in five days, leaving four days to the good. The question was whether those four days were to be taken to be days of twenty-four hours or days of (say) twelve hours as being working hours. The argument of the judgment is that, whether the charterer loads for twelve hours on Monday and twelve hours on Tuesday, or loads for twenty-four hours on Monday, he has equally employed twenty-four hours in loading, and has saved no time so far as loading is concerned, but that the same is not true as regards the shipowner. In the former case the ship would be kept two days, and in the latter only one day, for the purpose of doing twenty-four hours' work. In that state of facts the decision was that it was right to say that "10*s.* an hour on time saved" meant time saved to the shipowner, and that therefore the question was by how many hours was the ship the sooner ready. The reasoning seems to me absolute and unanswerable upon the problem there to be solved, but to have no bearing at all upon the question we have to decide. The language of that contract pointed, and, as the Court thought, necessarily pointed, to saving the shipowner's time. This contract by its express language, as it seems to me, points to a saving of the charterers' days.

Appeals dismissed.

Solicitors for plaintiffs: *Charles Russell & Co., for Lightbound, Owen & MacIver, Liverpool.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1907
May 28, 29.

LLOYD AND WIFE *v.* GREAT WESTERN DAIRIES COMPANY.

Practice—Joinder of Causes of Action—Leave of Court or Judge—Leave given after issue of Writ—Waiver of Objection by Defendant—Order XVIII. *r.* 2; *Order* LXX., *rr.* 1, 2.

Leave to join another cause of action with an action for the recovery of land may be given by the Court or a judge after issue of the writ in which the causes of action have been improperly joined. Such a joinder is an irregularity only, and an objection to the writ on that ground is capable of being waived by the defendants.

In re Pilcher, *Pilcher* v. *Hinds*, (1879) 11 Ch. D. 905, and *Smurthwaite* v. *Hannay*, [1894] A. C. 494, considered.

APPEAL from an order of Walton J. at chambers, setting aside the writ and statement of claim in the action on the ground of irregularity.

The facts giving rise to the appeal were shortly as follows. The action was commenced on December 6, 1906, by the issue of the writ by John Lloyd, his wife not being joined as a co-plaintiff. The writ was indorsed with a demand for possession of a house, a claim for damages for wrongfully entering and depriving the plaintiff of the profits of the business of a dairyman carried on in the house, for mesne profits, for an account of the profits of the business, and also with a claim for an injunction to restrain the defendants, their servants, agents or assigns, from remaining or continuing to carry on the business at the premises, and for the appointment of a receiver and manager of the business. Prior to the issue of the writ the plaintiff had not obtained leave under Order XVIII., r. 2, to join the other causes of action with the claims for possession of the house and for mesne profits. On December 13, 1906, unconditional appearance to the writ was entered by or on behalf of the defendants. On January 17, 1907, an order was made at chambers upon a summons for the appointment of a receiver of the profits of the business, the defendants appearing and taking part in the argument. On January 24 an order was made at chambers

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upon a summons for directions. On February 4 an appeal was heard by the Court of Appeal against the order of January 17 for the appointment of a receiver, when the appeal was allowed and the order discharged on the ground that the business was the property of Mrs. Lloyd, who was not a party to the action. On February 19 a summons for leave to add Mrs. Lloyd as a co-plaintiff was opposed by the defendants at chambers and was dismissed by the Master, but on appeal leave was on February 25 given by the judge. On March 4 a statement of claim was delivered by the plaintiffs, and on March 18 the defendants took out a summons for time to plead. Finally, on March 21 the defendants took out the present summons to set aside the writ and statement of claim for irregularity, on the ground that leave had not been obtained for the joinder of other causes of action with the claim for possession of the house. An order was made in the terms of the summons by Walton J., from which order the plaintiffs now appealed.

Barrington-Ward (*Clarke Hall* with him), for the plaintiffs. The order setting aside the writ and the statement of claim was improperly made. It is admitted that the issue of the writ was irregular in the first instance by reason of the joinder of the other causes of action with the claim for possession of the house without obtaining leave. But there is nothing to shew that the leave must necessarily be given before the issue of the writ, and that a writ issued without leave is an absolute nullity; the leave may be given subsequently if the circumstances are such as to justify it. In any case it is an irregularity which can be waived, and the defendants have waived it; they have taken more than one step in the action after knowledge of the irregularity, and therefore under Order LXX., r. 2, the application to set aside the writ ought not to be allowed.

Arthur Powell, K.C. (*Arthur Sims* with him), for the defendants. The order setting aside the writ was right and should be affirmed. An application for leave to join another cause of action with an action for the recovery of land must be made before the writ is issued: *Pilcher* v. *Hinds* (1); the objection was therefore one

(1) 11 Ch. D. 905.

that could not be waived by the defendants. The effect of that decision is that the writ in this action, in which another cause of action was joined with a claim for the recovery of land, was wholly bad; it was much more than an irregularity, and, being a nullity, the defect was incapable of being cured either by waiver or by amendment by leave of the Court or judge. It is a defect which goes to the root of the action: *Smurthwaite* v. *Hannay*. (1)

[BUCKLEY L.J. The judgment of Jessel M.R. in *Pilcher* v. *Hinds* (2) seems to have proceeded on the ground that it was an application for indulgence, for which no special ground was shewn.]

It is submitted that it is an express authority for the proposition that the leave cannot be given after issue of the writ. In any event, the learned judge's decision was right on the merits. The defendants did not waive their objection by taking out a summons for time to plead. The addition of a new plaintiff was practically equivalent to the issue of a new writ, and the defendants could have objected at the time; they are not deprived of their right of objection because they waited to see whether the new claim would be proceeded with in the statement of claim.

Barrington-Ward was not called upon to reply.

[The following cases were also referred to during the argument: *Mulckern* v. *Doerks* (3); *Rusbrooke* v. *Farley* (4); *Wilmott* v. *Freehold House Property Co.* (5); *Musgrave* v. *Stevens* (6); *Derbon* v. *Collis* (7); *Hunt* v. *Worsfold*. (8)]

VAUGHAN WILLIAMS L.J. I am of opinion that this appeal should be allowed. We have had an interesting argument on behalf of the defendants, and it is not to be disputed that, if this is a case in which the defendants could waive an irregularity, their conduct was such as to amount to a waiver. The argument comes to this: that, regard being had to the Judicature Act and Rules, that which was done here by the joinder of two causes of action, one of which was an action for the recovery of land, was

(1) [1894] A. C. 494.
(2) 11 Ch. D. 905.
(3) (1884) 53 L. J. (Q. B.) 526.
(4) (1885) 54 L. J. (Ch.) 1079.
(5) (1884) 51 L. T. 552.
(6) [1881] W. N. 163.
(7) (1888) 58 L. T. 519.
(8) [1896] 2 Ch. 224.

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not a mere irregularity, but was something quite different and of a character which could not be waived. It is not necessary to examine the authorities at any length, because the argument for the defendants went straight to the real point and to the authority most in their favour; that was the view expressed by the House of Lords in *Smurthwaite* v. *Hannay*. (1) Reliance was placed on the language of Lord Herschell (2): "I cannot accede to the argument urged for the respondents, that even if the joinder of the plaintiffs in one action was not warranted by the rule relied on, this was a mere irregularity of which the plaintiffs, by virtue of Order LXX., could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity." It will be convenient at this point to refer to the provisions as to the effect of non-compliance with the rules of procedure contained in Order LXX. Rule 1 provides that "Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or judge shall think fit." Then r. 2 says: "No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity." The second passage in *Smurthwaite* v. *Hannay* (1) which was relied upon occurs in the judgment of Lord Russell of Killowen C.J., who said (3): "A further point was taken at the Bar on the part of the respondents, namely, that the joinder of the plaintiffs in a way not authorized by Order XVI. was a mere irregularity, and that the appellants came too late to take advantage of it. This objection is not, in my judgment, well founded. In my judgment, such joinder of plaintiffs is more than an irregularity: it is the constitution of a suit as to parties in a way not authorized by the law and the rules applicable to procedure; and apart altogether from any express power given by the rules, it is fully within the

(1) [1894] A. C. 494. (2) Ibid. at p. 501.
(3) Ibid. at p. 506.

competence of the Court to restrain and to prevent an abuse of its process." Both Lord Herschell and Lord Russell of Killowen deal with the matter on the footing that in that case the joinder of plaintiffs with different causes of action made the action one which was altogether unauthorized and ill-constituted and which was recognized neither by the Act nor the rules. In the present case the same cannot be truly said, because the language of Order XVIII., r. 2, is: "No cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed." The very words "unless by leave" shew that the constitution of an action by the joinder of a cause of action for the recovery of land with another cause of action is a form of action recognized by the Act and rules, and is one which may be adopted by leave of the Court or a judge. I can find no authority for the proposition that there is no jurisdiction in the Court or judge to give leave after the issue of the writ; on the contrary, there are cases which shew plainly that in several cases leave has been given after the writ has been issued. In those circumstances it seems to me that in the present case, where the application of the defendants is to set aside the proceedings after all the acts of waiver committed by them, not only had the learned judge a jurisdiction which he exercised by refusing to set aside the proceedings and by giving leave then to join the causes of action, but also the case was one in which effect ought to be given to the acts of waiver on the part of the defendants, because the case of waiver is a very strong case indeed. I think the Court or judge has jurisdiction to give the leave at such a period, and to treat the proceedings as originally wrong but subsequently validated by the leave given, and the present case is far too strong a one for us to say that it is not within the rules; for it is plain that when this summons came before the learned judge at chambers, it came before him with the wife's name added as a plaintiff for the very purpose of validating the claim in respect of the value of the

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business which was added to the claim for recovery of land. We are told that the point now argued was not absent from the consideration of the defendants when the application was made to add the wife as a co-plaintiff, but that they preferred to wait until the statement of claim was delivered instead of taking their objection at that time. Under these circumstances it would be a very strong thing to hold that there had not been a waiver by the defendants which made it too late to take any objection to the jurisdiction; on the contrary, in my opinion it is a case in which we ought to give the fullest effect to the acts of waiver.

FLETCHER MOULTON L.J. I am of the same opinion. The effect of Order XVIII., r. 2, is that no cause of action, with certain strictly limited exceptions, can be joined with an action for the recovery of land, unless by leave of the Court or a judge. This provision appears to have been made for the protection of defendants, and a defendant can therefore by his conduct waive the performance of the condition because it is a condition imposed for his benefit. In the present case it is not contested that the acquiescence in the proceedings for some months by the defendants would amount to a waiver, if it were possible for them to waive the objection. I am of opinion that it was possible to waive the objection, and that the defendants did do so. But the defendants say that they did not intend to take advantage of the plaintiff's original mistake, and would not have done so had the original plaintiff, the husband, remained the sole plaintiff, but that when the wife was joined as a co-plaintiff they were entitled to take advantage of any irregularity. I think that this cannot be permitted. By not taking their objection within a reasonable time they so altered the position of things that the writ must be regarded for all purposes as being a writ regularly issued, and in such cases the Court has power to add a new plaintiff without giving any new right of objection to the defendants. In other words, the defendants by not taking the objection within a reasonable time and permitting various steps to be taken in the action under the original writ, placed it in the position of a writ that had been regularly issued, i.e., by leave of the Court. The

addition of the wife as a co-plaintiff in such a case could give to the defendants no right of objection, and consequently the appeal must be allowed.

BUCKLEY L.J. I agree. The writ in the action was issued on December 6, 1906, and was indorsed with a demand for possession of certain premises, and a further claim for the profits of the business of a dairyman. This indorsement was wrong, being in contravention of Order XVIII., r. 2, which in substance forbids the joinder without leave of any other cause of action with an action for the recovery of land. It was contended before us that the writ and all proceedings must necessarily be set aside because leave was not given before the issue of the writ; and the case of *Pilcher* v. *Hinds* (1) was cited in support of that contention. It is not an authority for that proposition. The application there was treated as one which the Court could have granted, had they thought fit, but were not disposed to grant. If the language of Jessel M.R. could bear another interpretation, his real meaning is shewn to be that which I have stated, by looking at the case of *Musgrave* v. *Stevens.* (2) In that case the writ was indorsed with a claim for an injunction to restrain the defendant from removing straw from a farm; then there was an application for leave to amend the writ by adding a claim to recover possession of the farm. This was refused by Chitty J. upon the ground that he was bound by *Pilcher* v. *Hinds.* (1) The case was then carried to the Court of Appeal, where Jessel M.R. was again a member, and that learned judge said that the words of the rule (which for the purposes of this case are identical with the present rule) were certainly wide enough to justify leave being given after the issue of the writ, but that the plaintiff must make a very special case for an amendment after service of the writ. As sufficient cause was not shewn in that case, the application was refused. Therefore, upon the authorities, leave may be given after the issue of the writ.

To continue the facts: upon December 13 the defendants entered an appearance, and on January 17, 1907, took part in the argument upon an application for the appointment of a receiver

(1) 11 Ch. D. 905. (2) [1881] W. N. 163.

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of the profits of the business, which resulted in an order being made. On February 4 the Court of Appeal, on the appeal of the defendants, discharged that order on the ground that the person who was interested in the profits of the business was not before the Court. Then on January 24 the defendants appeared on a summons for directions, and on February 19 they opposed a summons for leave to add the wife as a co-plaintiff, which was dismissed by the Master, though leave was given on appeal by the judge at chambers. Through all these stages the defendants were well aware that two causes of action were indorsed on the writ, yet they made no application to have the writ discharged or set aside. The order of February 19 could not have been made unless the Court had treated the action as brought upon proper causes of action vested in the two plaintiffs. In substance that order was an approval by the learned judge of the writ in the form in which it then stood. That order was served on the defendants on February 27, and on March 4 the defendants demanded a statement of claim; on March 18 they took out a summons for time to plead, and not until March 21 did they take out the summons to set aside the writ. It seems to me that there has been waiver over and over again, and further that in substance leave to join these causes of action has been given by the judge. Having regard to Order LXX., r. 2, I think that the defendants failed for much more than a reasonable time to take their objection. *Smurthwaite* v. *Hannay* (1) is no authority for the defendants' contention. The House of Lords there arrived at the conclusion that the causes of action in that case were incapable of being joined; whereas Order XVIII., r. 2, does allow these causes of action to be joined under certain conditions. For these reasons I am of opinion that the decision of the learned judge at chambers cannot be supported.

Appeal allowed.

Solicitor for plaintiffs: *F. Freke Palmer.*
Solicitor for defendants: *T. Lamartine Yates.*

(1) [1894] A. C. 494.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1907
June 3, 4, 5.

SMITH *v.* PROSSER.

Negotiable Instrument—Promissory Note—Signature in Blank—Delivery to Agent for safe Custody—Fraudulent Negotiation of Note by Agent—Rights of Bona Fide Indorsee for Value.

The defendant in South Africa, being about to leave for England, gave to two persons a power of attorney to act for him in his absence. He further, in anticipation of the possibility of funds being suddenly required during his absence, signed his name on two blank unstamped pieces of paper, which were lithographed forms of promissory notes, and handed them to one of the two agents with instructions that they should be retained in the custody of his attorney until the defendant should, by telegram or letter from England, give instructions for their issue as promissory notes and as to the amounts for which they should be filled up. After the defendant had left South Africa, the attorney to whom he had handed the documents, without waiting for instructions from the defendant (which were in fact never given), and in fraud of the defendant, filled in the blanks in the documents so as to make them appear to be promissory notes for considerable sums and sold them to the plaintiff, who took them honestly and in good faith, and without notice of the fraud, and gave full value for them. For the purpose of suing upon them in England the notes were stamped as foreign bills :—

Held, that, as the defendant handed the notes to his agent as custodian only, and not with the intention that they should be issued as negotiable instruments, he was not estopped from denying the validity of the notes as between himself and the plaintiff, and that the action was not maintainable.

Lloyd's Bank, Ld. v. *Cooke*, [1907] 1 K. B. 794, distinguished.

Appeal from a decision of Grantham J. in an action tried without a jury.

The action was brought against the defendant as the maker of two promissory notes for 268*l.* 6*s.* 8*d.* and 210*l.*, which were dated July 16, 1902, and were respectively payable two months and three months after date. From the facts proved at the trial, it appeared that the defendant was, shortly before the date in question, living in South Africa, being largely interested in mining concessions and mining properties. Being obliged to go to England on business connected therewith, and being desirous of providing funds for business disbursements which he anticipated might be necessary during his absence, he

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executed a power of attorney in favour of two persons, named Telfer and Wilson, and signed the two documents sued upon as promissory notes. When signed by the defendant they were merely unstamped pieces of paper, bearing upon the face of them lithographed forms of promissory notes, with blanks for date, amount, name of payee, &c.; none of these blanks were filled up by the defendant, who merely wrote his name in the ordinary place for the maker's signature. The documents, bearing at the time no writing upon them beyond the defendant's signature, were handed by the defendant to Telfer, with instructions substantially amounting to a direction that they should be retained in the custody of his attorneys until the defendant should either by telegram or by letter from England give instructions that they should be issued as promissory notes for the purpose of raising money upon them and as to the amounts for which they should be filled up. Shortly after the defendant had left South Africa for England, Telfer brought the notes to the plaintiff, who carried on business in Cape Town, and asked him to buy them. Telfer was at that time without any instructions from the defendant authorizing him to fill up or part with the documents, and the defendant in fact never gave either Telfer or Wilson instructions to negotiate them. The plaintiff required two additional names on the notes, and Telfer signed them himself and obtained the signature of a man named Robinson; the notes were then bought by the plaintiff at their full value. The details in the notes as to date, amount, &c., had been filled in by Telfer when the plaintiff purchased them, and they were made payable to the plaintiff's order at two and three months after date respectively; the notes were not stamped. Telfer, who died before the trial of the action, used the proceeds of the notes for his own purposes, and, as was found by the judge at the trial, acted throughout with a fraudulent intention. The plaintiff, who was found to have acted honestly and to be a bona fide holder for value without notice of the fraud, came to England about three years after the purchase of the notes, and eventually brought the present action, the notes having been stamped as foreign bills for the purpose of suing upon them. Grantham J. found that the notes had not

been properly negotiated to the plaintiff, and that he was not entitled to recover. The plaintiff appealed.

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Montague Lush, K.C., and *Reginald Neville*, for the plaintiff. Upon the facts of the case, and upon consideration of the authorities, the plaintiff is entitled to succeed. In *Herdman* v. *Wheeler* (1) it was decided that, in a case such as this, there being no negotiation of the note, the estoppel provided for by s. 20 of the Bills of Exchange Act, 1882, which reproduces the law merchant on the subject in the case of bona fide indorsees for value, did not arise; but in *Lloyd's Bank, Ld.* v. *Cooke* (2) it was held that, assuming the decision in *Herdman* v. *Wheeler* (1) to be correct, there was in such a case as this a common law estoppel which prevented the defendant from denying that he had given authority to the person to whom he had entrusted the paper signed in blank to fill it up for the amount for which he had in fact filled it up, and it would seem that in the later case Fletcher Moulton L.J. was of opinion that *Herdman* v. *Wheeler* (1) was wrongly decided. In the present case the notes having been signed, issued, and intended to be transferred in South Africa, are foreign notes; and, as s. 18 of No. 19 of the Cape of Good Hope Statutes, 1893, like s. 20 of the Bills of Exchange Act, 1882, only applies to paper bearing a stamp which has been signed in blank, no question of a statutory estoppel arises: but the common law estoppel which was held to have arisen in *Lloyd's Bank, Ld.* v. *Cooke* (2) also arises in the present case; it is therefore not really material to consider whether there can be said to have been a negotiation of the notes to the plaintiff. The defendant left these instruments signed by him in blank in the hands of Telfer in order that he might fill them up as promissory notes with the requisite amounts for the purpose of raising the money which might be required in order to keep alive mining options in South Africa in which the defendant was interested, and for other purposes, while the defendant was absent in England; and therefore, on the principle laid down in *Lloyd's Bank, Ld.* v. *Cooke* (2) on the authority of *Brocklesby* v. *Temperance Permanent Building*

(1) [1902] 1 K. B. 361. (2) [1907] 1 K. B. 794.

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Society (1), he is estopped from denying that Telfer had authority to fill the notes up as he did.

It is true that in this case the notes, when signed, bore no stamp, whereas in the case of English negotiable instruments in which this estoppel has been held applicable the document signed in blank has apparently always borne a stamp at the time of signature, and, as already stated, s. 20, sub-s. 2, of the Bills of Exchange Act, 1882, only applies to blank stamped papers signed and delivered by the signer that they may be converted into negotiable instruments. This, however, is because by the English Stamp Acts an English negotiable instrument, except in the case of the duty of a penny upon a bill of exchange for the payment of money on demand, had, and has still, to be stamped with an impressed stamp, which must be impressed before execution, otherwise the instrument is void; in the case of an English promissory note it might be essential that it should bear a stamp when signed in blank. The notes in question were unstamped when signed, but they were foreign notes, and by the law of the Cape the duty on negotiable instruments such as these may be paid by means of adhesive stamps, which, it would appear, may be affixed after execution. Therefore the absence of a stamp on the notes when signed could not prevent the estoppel relied upon from arising. The adhesive stamps requisite under English law in the case of promissory notes made out of the United Kingdom were affixed before action. The law of a place abroad as to stamp duty is prima facie a mere fiscal regulation, with which the English Courts have no concern. It is only when by the lex loci contractus the instrument is rendered void by the absence of a stamp, which does not appear to be the case by Cape Law, that the Courts in England will take notice of such absence: see *Bristow* v. *Sequeville*. (2) By s. 72 of the Bills of Exchange Act, 1882, where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

The insertion of the word "we" before "promise to pay" and

(1) [1895] A. C. 173.

(2) (1850) 5 Exch. 275.

the addition of the names of Telfer and Robinson on the back of the notes are not material; they might possibly have been material on the question whether the plaintiff took the notes in good faith, but the judge has found that he did. The plaintiff was not a person likely to be familiar with the law of bills of exchange, and probably thought that Telfer was intended to be a joint maker of the note, and it is not suggested that the plaintiff acted otherwise than honestly and in good faith. The character in which Telfer and Robinson signed appears to have been that of indorsers: *Steele* v. *McKinlay* (1); but, in whatever capacity they became parties to the note, it cannot be suggested that the insertion of the word "we" prevents the note from being valid as a note made by the defendant, for the addition of the two names on the back of the note did not enhance the defendant's liability. An alteration after signature, if material, no doubt avoids the instrument, but not otherwise: see *Atkinson* v. *Hawdon* (2); *Suffell* v. *Bank of England.* (3) The plaintiff did not know that by the power of attorney another attorney was nominated to act with Telfer. He was entitled to assume, from the fact that the notes were left with Telfer signed by the defendant, that Telfer was authorized to raise the amounts appearing on the notes. [They also cited *Awde* v. *Dixon* (4); *Scholfield* v. *Earl of Londesborough* (5); *Nash* v. *De Freville* (6); *Swan* v. *North British Australasian Co.* (7); *Ex parte Swan* (8); *London Joint Stock Bank* v. *Simmons* (9); *Barker* v. *Sterne* (10); *Stoessiger* v. *South Eastern Ry. Co.* (11); *Russel* v. *Langstaffe* (12); *Crutchly* v. *Mann* (13); *Cruchley* v. *Clarance* (14); Dicey's Conflict of Laws (1906), pp. 602—604; Westlake's Private International Law, 4th ed. p. 272, § 209.]

Arthur Powell, K.C., and *Woolf*, for the defendant. The suggested estoppel does not arise, for the case does not come

(1) (1880) 5 App. Cas. 754.
(2) (1835) 2 A. & E. 628.
(3) (1882) 9 Q. B. D. 555.
(4) (1851) 6 Exch. 869.
(5) [1896] A. C. 514.
(6) [1900] 2 Q. B. 72.
(7) (1863) 2 H. & C. 175.
(8) (1859) 7 C. B. (N.S.) 400.
(9) [1892] A. C. 201, at p. 213.
(10) (1854) 9 Exch. 684.
(11) (1854) 3 E. & B. 549.
(12) (1780) 2 Doug. (4th ed.) 514.
(13) (1814) 5 Taunt. 529.
(14) (1813) 2 M. & S. 90.

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within the principle laid down in *Lloyd's Bank, Ld.* v. *Cooke.* (1) In order to bring a case within the principle of that decision, and of the authorities on which it was based, it is essential that the instrument signed in blank should have been placed in the hands of the agent with authority to fill it up and raise money upon it. In the present case the notes were placed in the hands of the persons named in the power of attorney, not with authority to raise money upon them, but to keep them as custodians until such time as the defendant should telegraph out instructions as to how to fill them up and the amounts to be raised upon them. Until the defendant did that, Telfer was a mere custodian of the documents with no authority to deal with them at all. The common law estoppel suggested by the plaintiff only arises when documents have been entrusted to an agent to be used by him: see per Vaughan Williams L.J. in *Farquharson Brothers & Co.* v. *King & Co.* (2) The decision in *Lloyd's Bank, Ld.* v. *Cooke* (1) cannot, of course, be questioned in this Court; but it does not seem to have been pointed out in that case that what the defendant Cooke did amounted to forgery: see *Rex* v. *Minter Hart* (3); and it is clear from many authorities that forgery by an agent cannot give a good title to a negotiable instrument. The present case comes within the principle of *Baxendale* v. *Bennett* (4), for here the defendant had never issued the notes intending them to be used. The case of *Brocklesby* v. *Temperance Permanent Building Society* (5), upon the authority of which *Lloyd's Bank, Ld.* v. *Cooke* (1) was decided, was one in which the agent entrusted with securities used them in carrying out a transaction of the kind which he was authorized to carry out, though he exceeded the limit which was imposed on his authority unknown to the persons with whom he dealt; but in the present case Telfer, in issuing the notes, was not doing an act of a kind which he was authorized to do, for he was not authorized to do anything with the notes until he received instructions from the defendant. In *Baxendale* v. *Bennett* (4) the instrument was a complete instrument, so that the present

(1) [1907] 1 K. B. 794.
(2) [1901] 2 K. B. 697, at p. 713.
(3) (1837) 1 Mood. C. C. 486.
(4) (1878) 3 Q. B. D. 525.
(5) [1895] A. C. 173.

case is an a fortiori case. The authorities shew that, if a principal gives an agent authority to fill up as a note a paper signed by him in blank, he cannot be heard to deny the agent's authority for the sum for which the agent fills it up, but no authority shews that the placing of an instrument signed in blank in the hands of an agent estops the principal from denying that he ever gave the agent any authority to fill it up at all. [They cited on this point *Hanbury* v. *Lovett* (1); *Schultz* v. *Astley* (2); *Carr* v. *London and North Western Ry. Co.* (3); *France* v. *Clark.* (4)]

Secondly, there was evidence that by the Cape of Good Hope stamp laws a promissory note must be stamped before it is negotiated in any way, and that a penalty is imposed for contravening the law in this respect. Prima facie what is prohibited under a penalty is meant to be illegal, and therefore these instruments, not having been stamped before they were negotiated to the plaintiff, must be regarded as void; and it is clear that an English Court cannot give effect to an instrument which is void by the lex loci contractus.

Thirdly, the plaintiff was informed by Telfer that he was acting for the defendant under a power of attorney, though he did not apparently know that Wilson was by the power nominated jointly with Telfer. It is clear that where a person dealing with an agent knows that his authority is in writing he is affected with constructive notice of the contents of the writing, and, if he does not choose to inquire what they are, he takes the risk of the agent's exceeding his authority. If the plaintiff had required to see the power of attorney, he would have seen that Telfer was only entitled to act jointly with Wilson [They cited on this point *Hatch* v. *Searles.* (5)]

Montague Lush, K.C., in reply.

VAUGHAN WILLIAMS L.J. I do not think that this case is so complicated as it has been described by counsel. I agree, however, that it is necessary to understand clearly what are the

(1) (1868) 18 L. T. 366.
(2) (1836) 2 Bing. N. C. 544.
(3) (1875) L. R. 10 C. P. 307.
(4) (1884) 26 Ch. D. 257.
(5) (1854) 2 Sm. & G. 147; 24 L. J. (Ch.) 22.

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principles upon which it has been held that a person who signs a promissory note as maker or a bill of exchange as acceptor, or who indorses either of them, is held to be responsible to a bona fide holder for value, even though the document was not a perfect document at the moment when it left the hands of the maker, acceptor, or indorser, as the case may be. A great many authorities have been cited, many of which are decisions prior to the Bills of Exchange Act, 1882; and I think I may say generally that the passing of that Act, which codified the then existing law, has not altered in any respect material to the present case the law as laid down in the prior authorities. The principal section of the Bills of Exchange Act that has been relied on in argument is s. 20, which consists of two sub-sections and a proviso. Sub-s. 1 runs: "Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit." The expression there employed is "a simple signature on a blank stamped paper," but this changes to "instrument" in sub-s. 2, which provides that "In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact." Then comes the proviso: "Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given." I agree with the contention of Mr. Lush that that section does not really apply in the present case. If we deal with sub-s. 1, which speaks of a signature on a blank stamped paper, the proviso cannot apply because the instrument was not negotiated after completion; while sub-s. 2 only applies

where the filling up has been strictly in accordance with the authority given, which was not the case here.

I will now say a few words about the facts. The defendant entrusted Telfer and another person with certain promissory notes, which were on ordinary lithographed forms with blank spaces in which were to be filled in names and amounts, &c. The defendant signed the notes while they were still in blank; they were at the time unstamped, and they remained unstamped when they were discounted. He in fact deposited the notes with instructions, which, with the attendant circumstances, are thus set out in the judgment of Grantham J.: "The defendant was engaged chiefly in mining business in South Africa. He had to return to England in the middle of 1902 in connection with his business. Knowing that money might be wanted to pay fees for mining licences on some of the options which he possessed, and having also other business matters which would require the attention of some one on his behalf on the spot, he gave a power of attorney to two friends, Telfer and Wilson, to act on his behalf, and, in case of a sudden emergency that required money at once, he left the two promissory notes in blank signed by himself to enable the two holders of the power of attorney to fill them up for the required amount on his cabling them from England instructions for so doing. As he could not leave the notes with two persons, he chose Telfer as the person to be entrusted with them, Telfer being considered a most honourable and well-to-do man. Shortly afterwards the defendant left South Africa. Telfer, in fraud of the defendant and on false statements made to the plaintiff, asked the latter to buy the notes, which the plaintiff knew were made in blank, telling the plaintiff that he was acting under a power of attorney from the defendant. The plaintiff refused to buy the notes until another name had been put on the back, and Telfer accordingly asked one Robinson, who was much interested in the defendant's affairs, to back the notes, which he did without any consideration at all, believing Telfer's story. The plaintiff made no inquiries as to the terms of the power of attorney. Telfer and Robinson put their names on the back of the notes, and the plaintiff agreed to buy them, and his name was filled in as payee, and he gave

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Telfer cash for the notes, less a small discount, to which he was fairly entitled." Upon these facts the learned judge gave judgment for the defendant. I entirely agree in the result of the judgment, but I prefer to express my own view as to how that result should be arrived at. I do not say that a point might not be made as to the notice which the plaintiff had when he advanced money against the sale of these notes. A point was in fact made that he had notice that Telfer was acting under a power of attorney, and that the plaintiff ought to have made inquiries; but I do not desire to rest my judgment on that ground, nor do I rest it on the ground that there was no stamp, impressed or adhesive, on the note when Telfer assumed to negotiate it by selling it to the plaintiff.

I propose to deal with the case in this way. Here is a document which was in an incomplete state at the moment of its negotiation. If that note, being in that condition, had been handed to Telfer (and I leave out of consideration for this purpose the fact that Telfer and Wilson were joint attorneys) for the purpose of his making use of it, and for the purpose of its being issued as a negotiable instrument, I am of opinion that prima facie the defendant would have been responsible to a bona fide holder for value who had purchased the note from Telfer as the plaintiff did. In my judgment it is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument, and with the intention that it should be issued as such. In my opinion this is not a case in which such facts appear. It is plain on the evidence, and on the conclusion arrived at by Grantham J., that what the defendant really did was to leave South Africa while uncertain that any money would be required for the mining speculations and promotions which he was carrying on, and quite uncertain as to any particular amount being necessary. Under these circumstances he applied to two persons to be his attorneys, and executed a power of attorney under which he gave them very general powers of acting in his absence. I draw no distinction between giving such a power to Telfer alone and giving it to Telfer and Wilson; I

treat the case as though Telfer were the only person with whom the notes were deposited. Under those circumstances the defendant came to England, and, being desirous that sums of money should be raised on his behalf if the necessity should arise while he was away, he delivered these notes to his attorney, not as notes to be issued, and which the attorney was from the first to have authority to fill up and issue, but as custodian only, and intending that the notes should not be issued until he sent instructions to that effect from England. Under these circumstances the authorities seem to shew that, in the absence of a delivery of notes to an agent with the intention that they shall be negotiated, or at any rate that the agent shall have power to negotiate them, the signer is not responsible even to a bona fide holder for value. I may say at once that the majority of the cases cited to us are not applicable at all, because most of the cases in which the person who signed the instrument was held responsible, although the instruments were negotiated in fraud of him, were cases in which either the instrument was itself complete, or else there was a parting with the instrument either with authority or instructions to the agent to fill it up, or with the more general intention that he should use it for the purpose of raising money by its negotiation. I will therefore only deal with the authorities in regard to entrusting an agent with the possession of a piece of paper which, when handed over to him, is not a complete negotiable instrument, but as to which a question arises as to the authority in fact of the agent to fill it up, or as to an estoppel binding the signer, though he did not sign it or hand it over with the intention that it should be negotiated, because he has acted in such a way as to deceive persons who have been induced by his conduct to treat that as an instrument properly negotiated which he did not intend to be negotiated. Examples of such decisions are *Baxendale* v. *Bennett* (1) and *London and South Western Bank* v. *Wentworth*. (2)

But first I desire to say a word as to the principle on which the person signing is held liable, although he did not intend the document to be dealt with in the manner in which it was in fact

(1) 3 Q. B. D. 525. (2) (1880) 5 Ex. D. 96.

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dealt with. I take it that the mere fact that the signer of a negotiable instrument has been negligent as regards the care taken by him in regard to a signed paper never renders him liable to be estopped from shewing the conditions under which he parted with its possession, unless he has so dealt with the instrument or given such instructions with regard to it as raised a duty between himself and the commercial public. Mere negotiation by itself, unless it raises such a duty, cannot raise an estoppel; though it may be true to say that where the fraud of a third party has caused injury to one of two innocent parties, that one must be held liable whose negligence rendered the fraud possible. In that sense negligence is not equivalent to mere carelessness which may cause harm, but it is negligence in the performance of a duty to the person who sets up the estoppel.

The case of *Baxendale* v. *Bennett* (1) was discussed during the argument. That was a case of a bill of exchange with a blank for the name of the drawer, and across the instrument the defendant wrote his name as acceptor. It was stolen from the acceptor's chambers, and a drawer's name inserted without the acceptor's authority, and passed to the plaintiff as a bona fide holder for value; the acceptor was held not to be liable. In the early part of his judgment Bramwell L.J. deals with the matter from the point of view that the liability, if any existed, arose by estoppel; but, after discussing the cases of *Young* v. *Grote* (2) and *Ingham* v. *Primrose* (3), with which he did not entirely agree (and which have indeed now ceased to be law), he says: "The defendant here has not voluntarily put into anyone's hands the means, or part of the means, for committing a crime. But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then *Bank of Ireland* v. *Evans' Trustees* (4) shews under such circumstances there is no estoppel. It is

(1) 3 Q. B. D. 525.
(2) (1827) 4 Bing. 253.
(3) (1859) 7 C. B. (N.S.) 82.
(4) (1855) 5 H. L. C. 389.

true that was not the case of a negotiable instrument; but those who complained of the negligence were the parties immediately affected by the forged instrument." I read that passage because, although that judgment is not so applicable to the present case as is the judgment of Brett L.J., it makes the latter easier to follow. The latter learned judge says, early in his judgment: "It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it." In the present case the defendant had made the notes, so no such question arises, but it is plain upon the facts that the defendant never authorized the negotiation or the filling in of the amounts. Pursuing his judgment, Brett L.J. differs from Bramwell L.J. as to the fact of negligence, and says: "I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover; he does not strictly authorize him, but enables him to fill it up"—if the passage stopped there, it might perhaps assist the plaintiff's argument, but the Lord Justice goes on—"to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up." In the present case it is plain upon the facts that the defendant did not issue, and did not authorize his attorney to issue, the promissory notes; nor did he authorize anyone to fill them up; he merely handed the notes to his attorney and told him that he was to fill them up when he received his instructions to do so, which I understand to mean the same as though the defendant had added "and not otherwise," or had told his attorney not to fill them up until he received instructions from him to do so. Brett L.J. goes on to say, "he has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank-notes." It is plain that the promissory notes in the present case could not be

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in like manner current in the sense there given to the expression. Then Brett L.J. says, "but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used." In my opinion it is clear that the defendant in the present case did not issue the promissory notes intending them to be used, in the sense in which Brett L.J. uses those words. The defendant contemplated having to give instructions in the future as to their user, but his intention at the time was to hand them over for the purpose of deposit, not in order that they might be used, they were merely deposited with a statement that they were to be used if and when the defendant gave instructions to that effect. It is unnecessary for me to consider the remainder of the judgment of Brett L.J., which deals with the authority of *Young* v. *Grote* (1) and *Ingham* v. *Primrose* (2), a question which is now settled.

I ought to say a few words about *London and South Western Bank* v. *Wentworth.* (3) The head-note is in these words: "When a bill is accepted in blank for the purpose of being negotiated, and is afterwards filled in with the name and signature of a person as drawer and indorser, the acceptor cannot, as against a bona fide indorsee for value, adduce evidence to shew that either the drawing or indorsement is a forgery." In other words, the defendant in such a case is estopped from setting up that the drawing of the bill was a forgery, and is equally estopped from setting up the defence that the filling in in any way of a blank promissory note is contrary to private instructions given by him to his agent. The reason why I call attention to this case is that again and again in the judgment of the Court, which was delivered by Pollock B., wherever they are dealing with the question whether the defendant was estopped, they state it in such a way as excludes the present case. The learned judge says (4): "Let us now see to what extent the principles which are involved in the decision of this question have been considered and settled. Where a man signs his name to a blank stamped piece of paper, and delivers it to another to be negotiated"—he begins with that qualification—"this gives him

(1) 4 Bing. 253.
(2) 7 C. B. (N.S.) 82.
(3) 5 Ex. D. 96.
(4) 5 Ex. D. at p. 101.

authority to fill it up to the amount which the stamp will cover." Stopping there, I wish to say that, although the stamp is evidence of authority, it is also a limitation of the authority to the amount covered by the stamp. The judgment then proceeds—"treating the signature as that of the acceptor, and if the bill thus completed is indorsed to a holder for value without notice, he is entitled to recover upon it against him who has so signed his name, although the person to whom the blank paper is originally given may have defrauded the man who gave it to him." Then the judgment considers a number of authorities, among them *Baxendale* v. *Bennett* (1), which I have already discussed.

I need not call attention at greater length to this decision, but if the authorities there cited are looked at it will be found that in every case the party signing the negotiable instrument had parted with it for the purpose of its being negotiated. No one says here that the notes were parted with for immediate negotiation, but it is said that they were parted with in contemplation of instructions as to their negotiation being presently given by the defendant. The case seems to be one which is not covered by any rule deducible from the authorities. Plainly Telfer did that which he was not authorized to do, and it is contended by the defendant that he is entitled to set up that want of authority as a defence to this action. Why should he not do so? It is said that he is not so entitled because he delivered the notes to Telfer with the intention that they should be filled up and at the same time negotiated, and because at the time he informed his attorney that the reason was that he thought he might have occasion hereafter to give him instructions to fill up and negotiate the notes. At the moment when they were handed over no purpose or intention existed in the mind of the defendant that Telfer should negotiate the notes; he only proposed that he should keep them so that they should be ready in case the defendant should at some future time make up his mind that he had need for money which should be raised by their negotiation. For these reasons I am clearly of opinion that the decision appealed against should be affirmed.

(1) 3 Q. B. D. 525.

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FLETCHER MOULTON L.J. This appeal necessarily raises more than one difficult question, and touches upon many others. The facts are simple, but they depend to some extent upon our view of the evidence; I will therefore begin by stating what upon the evidence I consider the facts to be. The defendant was leaving South Africa on business connected with mining concessions and operations in that country, and he left a power of attorney to Telfer and Wilson, and also left with them two documents which were lithographed forms of promissory notes, with nothing further written upon them than his signature. He left the notes with them as his agents for the following purpose:—that they should be in their custody until either by telegram or letter he should direct them to be issued as notes for the purpose of raising funds which it might be necessary for him to have at his command in South Africa. These signed forms were actually handed to one only of the two attorneys, and this for the obvious reason that they could not be in the physical possession of both, but it was intended by the defendant, and understood by Telfer and Wilson, that they were left in their custody as being his attorneys for the above purpose. Telfer was a man of a high reputation for honesty, which he deserved but little. He came to the plaintiff and asked him whether he would purchase the defendant's two promissory notes; they were not, I think, produced at the time, but Telfer said that one was at two months, the other at three months, and that the total amount was about 500*l*. The plaintiff declined to purchase the notes unless they had two other signatures appended, and the notes were subsequently brought back to him with the words "I promise" altered into "We promise," and bearing the signatures of Telfer himself and of a man named Robinson. They were then bought by the plaintiff at their full value. No notice was ever given by the defendant to his attorneys that he wanted the notes negotiated, and the transaction was carried out by Telfer with a fraudulent intention. The notes were unstamped when they were made, and nothing was done upon them for three years, when the plaintiff came to England with them and brought this action upon them. For the purposes of this action they were stamped as foreign bills, and were properly stamped under

the English stamp law when the writ was issued. Under these circumstances, is the plaintiff entitled to recover?

In Cape Colony there is a stamp law closely akin to that of England, and s. 18 of the Cape Act is substantially the same as s. 20 of the Bills of Exchange Act, 1882. But under the circumstances of the case neither of those sections is applicable; they only apply to cases where a person signs a stamped piece of paper; here the instruments were on unstamped paper. Nor do I think that the question whether the notes were stamped or not at the time of execution has any bearing upon the case, even from the point of view of an estoppel being raised against the defendant; for it seems that the Cape law, though it directs that a bill or note shall be made on paper with an impressed or adhesive stamp, does not make that condition essential to its validity, and a bill or note can in that country be stamped after its making. I think, therefore, that the absence of a stamp was not notice to the plaintiff of Telfer's want of authority. I need not further refer to the stamp question.

As s. 18 of the Cape Act and s. 20 of the Bills of Exchange Act do not assist us, we are thrown back on the common law doctrine of estoppel (which was in existence long before the Bills of Exchange Act) as applicable to the case of negotiable instruments. I will deal first with the circumstances under which the plaintiff purchased the bills, in order to see whether, under all the circumstances, it is just or equitable to say that the defendant is estopped from denying that the bills were made with his authority and that he is liable on them. In my opinion the proper conclusion to be drawn from the evidence is that the plaintiff had notice that Telfer held a power of attorney from the defendant, and also that the plaintiff was aware that Telfer was exercising powers on behalf of the defendant as to filling up the notes and making them joint notes, presumably derived from that power of attorney, and that he in fact thought Telfer was acting under the power of attorney. In other words, he had notice that Telfer was an agent who had written instructions limiting his authority, and that the notes were in his possession as such agent. Under the circumstances I am prepared to hold that

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the plaintiff was bound to examine into Telfer's authority as so limited, and if he had done so he would have found that Telfer could not act alone, and then this fraud could not have been perpetrated. In such a state of facts it would not be just to hold that the defendant is estopped from denying that the notes were made by his authority.

But although upon the special circumstances of the case I am of opinion that this action must fail, I am also of opinion that the same conclusion will follow if it be considered upon the broad grounds upon which Vaughan Williams L.J. has based his judgment, in which I entirely concur. The law stands thus. If a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument. Notice of such limitation may be given in various ways by the instrument itself. For instance, if in the country where the negotiable instrument is made, a negotiable instrument can only be made on paper bearing an impressed ad valorem stamp, the presence of a stamp on the piece of paper would be a notice of limitation of the agent's authority as to the amount of the instrument.

But, in the absence of notice appearing on the face of the instrument, so soon as there is an intention on the part of the signer that the piece of paper shall form the basis of a negotiable instrument, no limitation of the agent's authority can be allowed to affect third parties taking it without notice. But in my opinion there was no such intention here, and the action fails for that reason. I think that the defendant delivered the documents to Telfer (as representing his two attorneys) for safe custody only. No doubt both parties contemplated that the defendant might change his mind, and might direct that the documents, which physically were in the possession of the agent might at some future time be used as the basis of two promissory notes. But that fact does not qualify the purpose for which the instruments were consigned to Telfer. They were handed to him as custodian only, and it is immaterial whether, when they were so handed, the defendant said that the

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time might come when he might desire to change their character, or whether he made no remark on the subject. Both parties knew that they were delivered for safe custody only. The essential fact which is necessary to enable the plaintiff to establish his case is therefore absent. The defendant never issued the documents with the intention that they should become negotiable instruments. We were pressed with the argument that, as regards third parties, the question of the defendant's intention that Telfer should be the mere custodian of the documents or that he should have power to issue them as notes does not affect his liability, because in either view the possession of the documents enabled Telfer to put them in circulation as promissory notes. Therefore Mr. Lush, quoting *Lickbarrow* v. *Mason* (1), says that there is an estoppel on the defendant independent of any intention that they should become promissory notes. In my opinion this argument goes much too far. If we are to measure the estoppel by the physical possibility of deception, s. 20 of the Bills of Exchange Act would contain something which would be absolutely irrelevant, and which yet is made a condition of the section being applicable. That section commences with the words "Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill"; in other words, the intention that it shall be converted into a bill is made a condition of the operation of the section. In my opinion s. 20 is based upon the doctrine of common law estoppel as it existed at the date of the Act, and therefore the presence of the condition as to its operation shews that the Legislature realized that the intention that the document should be converted into a bill of exchange was essential in order to render the maker liable. In other words, both the common law and the statute realized the possibility of two rival dangers—on the one hand, a person who did nothing more than sign a blank stamped paper might find himself in the position of being the maker of a bill or note; on the other hand, a man might issue an incomplete bill or note and place it in the hands of an agent with a limited authority to fill it up, and the agent might fill it up without due regard to the limitations of his authority and

(1) (1794) 5 T. R. 683.

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put it in circulation and thereby injure innocent persons. They therefore drew the line as regards the protection of third parties in the following very reasonable and intelligible way: if the signer intended it to become a bill, it was for him to see that it was issued in accordance with his intentions, and if he did not do this, third parties would not be affected; on the other hand, if he did not intend it to become a bill, there would be no such duty incumbent upon him, and he would be in the same position as if he had merely signed it as an autograph. There would in that case be no animus emittendi, and he would therefore not be liable for the act of a bailee who turned the document into a negotiable instrument. The present case sharply raises the question of the line of demarcation, and as I think that the signed forms were in the possession of Telfer as custodian only, and not as the defendant's agent with an intention on the defendant's part that he should issue them as promissory notes, the defendant is not estopped from saying that he was not the maker of the notes sued upon. I agree that the appeal should be dismissed.

BUCKLEY L.J. I agree that this appeal fails, and I desire to make only two short observations upon two points that have arisen during the argument. First, as to the case of *London Joint Stock Bank* v. *Simmons*. (1) That decision is not, I think, available for the purpose for which the appellant sought to use it. The instruments there in question were negotiable securities; the question which the Court had to decide was a question between different persons claiming to be owners of them. That is not the question here; the question is whether these promissory notes were ever negotiable instruments. The decision cited is no authority upon that point. The passage which was cited from the judgment of Lord Herschell deals with negotiable instruments. He says (2): "Any person in possession of these may convey a good title to them, even when he is acting in fraud of the true owner, and although such owner has done nothing tending to mislead the person taking them." That passage does not apply to the maker of a promissory note, for the maker

(1) [1892] A. C. 201.

(2) [1892] A. C. at p. 215.

of a promissory note cannot be the owner of it as an obligation; he is the person liable upon the note, and not its owner.

The second remark which I wish to make is that this appeal fails on the ground that the promissory notes never became negotiable instruments, the reason being that the defendant never issued them, nor authorized any one else to issue them, as negotiable instruments. The result is the same as though the defendant had said to Telfer, "I hand you this piece of paper bearing my signature; keep it as my custodian, because it may be convenient in the future to make you my agent for its issue as a promissory note." The contemplated time never arrived; Telfer never had authority to issue the documents as promissory notes, but merely held them for safe custody. The recent decision of this Court in *Lloyd's Bank, Ld.* v. *Cooke* (1) has no application to the present case. There a person was entrusted with authority to fill up two promissory notes for a certain amount, and he filled them up for too large an amount. But the documents were handed to him for the purpose of issue as promissory notes, while here there has never been a negotiable instrument at all, and the authorities as to negotiable instruments have no application. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Church, Rackham & Co.*
Solicitors for defendant: *Richardson & Co.*

(1) [1907] 1 K. B. 794.

W. J. B.

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June 20.

THE KING *v.* WRAITH.
Ex parte KENT COUNTY COUNCIL.

Schools—Expenses incurred by County Council in respect of Capital Expenditure —Provision of New Hot-water Apparatus and Earth-closets—Charge on Parish served by School—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 18, *sub-s.* 1 (*c*).

In s. 18, sub-s. 1 (*c*), of the Education Act, 1902, the words "capital expenditure" do not mean the expenditure of money taken from capital, but the expenditure of money which on its being laid out becomes capital irrespective of the source from which it is taken.

RULE nisi obtained at the instance of the Kent County Council calling upon L. H. Wraith, the auditor appointed by the Local Government Board to audit the accounts of the applicants, to shew cause why a writ of certiorari should not issue directed to him to remove into this Court certain allowances made by him as such auditor (together with his reasons and grounds for the same), viz., the sum of 13*l.* in respect of the parish of Northfleet, and the sum of 31*l.* 12*s.* 6*d.* in respect of the parish of Rainham, on the ground that the two sums were expenses incurred by the applicants in respect of capital expenditure within the meaning of s. 18, sub-s. 1 (*c*), of the Education Act, 1902, and that the term "capital expenditure" in that sub-section is not limited to expenses which are met by means of loans.

By s. 1 of the Education Act, 1902, the applicants are the local education authority for the county of Kent.

By ss. 71 and 73 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), the accounts of the applicants are made up to the last day of each financial year, namely, March 31, and are audited by a district auditor appointed by the Local Government Board in like manner as the accounts of an urban authority under ss. 247 and 250 of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

By s. 18, sub-s. 1, of the Education Act, 1902, the expenses of a county council under that Act, so far as not otherwise provided for, are to be paid out of the county fund provided that "(*c*) the

county council shall charge such portion as they think fit, not being less than one-half or more than three-fourths, of any expenses incurred by them, in respect of capital expenditure or rent on account of the provision or improvement of any public elementary school, on the parish or parishes which, in the opinion of the council, are served by the school."

In the accounts of the council shewing the charges on the parishes of Northfleet and Rainham respectively made under s. 18, sub-s. 1 (*c*), of the Education Act, 1902, for the financial year ending March 31, 1906, it appeared that the council had charged on the parishes of Northfleet and Rainham respectively the sums of 9*l.* 15*s.* and 23*l.* 14*s.* 4*d.*, the sum of 9*l.* 15*s.* being three-fourths of 13*l.*, which was paid to one A. W. Newby for supplying, and fixing gratings over, hot-water apparatus for heating the Northfleet council school, and the sum of 23*l.* 14*s.* 4*d.*, three-fourths of 31*l.* 12*s.* 6*d.*, paid to Messrs. Kemp Brothers for erecting earth-closets at the Rainham county school. The sums of 13*l.* and 31*l.* 12*s.* 6*d.* were respectively expenses incurred by the council in respect of the provision of a new hot-water apparatus to the Northfleet council school and new earth-closets to the Rainham county school, where none had existed before, and were not in the nature of repairs or renewals of gratings or apparatus or earth-closets already provided, and were charged upon the parishes in the proportion of three-fourths as being capital expenditure within the meaning of s. 18, sub-s. 1 (*c*), of the Education Act, 1902. The accounts shewed a balance due against the parish of Northfleet of 507*l.* 17*s.* 3*d.*, and against the parish of Rainham of 305*l.* 1*s.* 8*d.*

In or about March, 1907, the respondent audited the accounts of the applicants for the financial year ending March 31, 1906.

To the accounts for the parish of Northfleet and Rainham the respondent appended in the adjustment ledger statements dated March 27, 1907, to the effect that he allowed the accounts, with the substitution of 491*l.* 2*s.* 3*d.* for 500*l.* 17*s.* 3*d.* as the balance against the parish of Northfleet, and of 281*l.* 7*s.* 4*d.* for 305*l.* 1*s.* 8*d.* as the balance against the parish of Rainham, the sums so substituted being in his opinion the correct balances

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after charging the sums of 9*l.* 15*s.* and 23*l.* 14*s.* 4*d.* to the general education fund account.

The respondent entered in the adjustment ledger a statement dated March 27, 1907, of his reasons for the allowance of both the accounts, with the substituted balances, which reasons were in effect that the sums of 13*l.* and 31*l.* 12*s.* 6*d.* were not expenses incurred in respect of capital expenditure within the meaning of s. 18, sub-s. 1 (*c*), of the Education Act, 1902, as the sums were paid by the applicants out of funds provided by rates made by them for the purposes of elementary education, and not raised by loans.

The applicants submitted that the sums of 13*l.* and 31*l.* 12*s.* 6*d.* were expenses incurred by them in respect of "capital expenditure" on the schools within the meaning of s. 18, sub-s. 1 (*c*), of the Education Act, 1902, and that they were entitled under the section to charge three-fourths of the sums on each of the parishes respectively, and that the respondent's reasons for allowing the accounts subject to the aforesaid alterations were bad in law, and that the respondent ought to have allowed both the accounts without alteration.

Pursuant to the provisions of s. 18, sub-s. 1, of the Education Act, 1902, and s. 68, sub-ss. 3, 7, of the Local Government Act, 1888, a separate account of expenses incurred under the Education Acts, 1870 to 1902, is kept by the applicants called the general education fund account. This includes sums raised by loan as well as sums paid out of rates, and the applicants submitted that sums paid out of rates were not necessarily to be excluded from expenses incurred in respect of capital expenditure within the meaning of s. 18, sub-s. 1 (*c*), of the Education Act, 1902.

Lord Robert Cecil and *Jeeves* shewed cause. The words "capital expenditure" in s. 18, sub-s. 1 (*c*), of the Education Act, 1902, mean expenditure of capital, and not expenses which may properly be placed to capital account. This was an expenditure out of revenue, not out of capital. There was, therefore, no power to charge any portion of it against the parishes. It ought to have been charged against the county

council. The "rent" mentioned in s. 18, sub-s. 1 (*c*), of the Act of 1902 is only an instalment of capital. The proviso to sub-s. 1 of s. 18 of the Act of 1902 was necessary in order to prevent every expense being borne by all the ratepayers in the county. But the intention of the Legislature was that if the expense was so important that it ought to be dealt with by means of a loan under s. 19, it could be charged as to a portion on the parish. It is only where a loan is necessary that any portion of the expenses can be so charged. The words "expenses incurred by them in respect of capital expenditure" point to the expenses of raising a loan. To hold that an expenditure which is not an expenditure of capital is within sub-s. 1 (*c*) of s. 18 would be to strike out the word "capital."

[Sects. 7 and 18, sub-s. 1 (*d*), of the Education Act, 1902, and s. 62, sub-s. 7, of the Local Government Act, 1888, were also referred to.]

Danckwerts, K.C., and *Ryde*, in support of the rule, were not called on.

LORD ALVERSTONE C.J. In my opinion it is not possible to put upon s. 18, sub-s. 1 (*c*), of the Education Act, 1902, the limited meaning which would result from the construction for which counsel has contended in shewing cause against the rule. The words used in clause (*c*) of the sub-section are not "out of capital moneys," or "out of money raised by loan in respect of capital expenditure," but "in respect of capital expenditure." The question is whether these words ought to have the meaning which has been put upon them by those who oppose the decision of the auditor. If so, in my opinion it is the duty of the Court to give that meaning to them.

Under s. 7 of the Act of 1902 the local education authority are to maintain and keep efficient within their area all public elementary schools which are necessary. That imposes upon the county authority the obligation of maintaining the schools. It was obviously contemplated that the schools might not be good enough, and might require to be improved; and accordingly some provision has been made for the case of schools which are improved—when they are in fact not

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Lord Alverstone C.J.

sufficient for the purposes of the Act and are made better. Sub-s. 1 of s. 18 of the Act of 1902, which deals with the expenses of the council under the Act, says that, so far as not otherwise provided for, they shall be paid in the case of a council of a county out of the county fund, and in the case of a council of a borough out of the borough fund or rate. It seems to me that prima facie any money which the council would have to spend would be provided, not by loans, but out of moneys thus raised in the one case out of the county fund, and in the other out of the borough fund or rate, and if no borough fund is levied, out of a separate rate.

Under those circumstances we must assume that the county council have spent the sums of 13*l.* and 31*l.* 12*s.* 6*d.* which are in question in the present case in doing something which is an improvement to the public elementary school. They have provided a heating apparatus which was not there before, and have put in an additional earth-closet. We have to consider the purpose of the statute. In my opinion it is dealing with the way in which the money is spent. If the school is not good enough, or if further school accommodation is required, which is to be obtained by way of rent, a certain proportion at least, and more at the discretion of the county council, is to be charged upon the parish or parishes which are served by the schools. The reason seems to be that if the money has been spent for that purpose, however it is found, the parishes ought to bear the expense.

If that is not the governing principle, it is difficult to see why "rent" should be included in the words of the sub-section. That observation is not answered by the suggestion that it was necessary to include rent, because otherwise an expense by way of rent would not be capital expenditure in any sense. I quite agree with that suggestion. It might fairly be contended that rent would not be capital expenditure; but the Legislature has thought fit to say that not only shall one-half or three-fourths of the capital expenditure be charged, but one-half or three-fourths of the rent. That seems to me to point to something which is in lieu of the school being provided or improved. I cannot myself see, if the Legislature was not

dealing with the character of the expenditure as distinguished from the character of the money by which the expenditure was met, why rent and capital expenditure should have been put in the same category. That consideration seems to guide us to the conclusion that the Legislature was not thinking of the purse out of which the money came, but of the purpose for which it was expended. The words mean capital expenditure in the accountant's sense of the word—money which cannot be properly said to be expended on maintenance nor on improvement by means of maintenance only, but expenditure which would be properly put down to capital. On behalf of the respondent it was contended that there can be no improvement unless by means of capital expenditure. I do not agree. I can well imagine that putting in a better heating apparatus, although simply by way of repair, might be a very material improvement. I think that there are many other ways in which the process of repairing property paid for out of the rates would in fact improve the school. It seems to me that that is the reason why sub-s. 1 (*c*) of s. 18 of the Act of 1902 was limited to expenses incurred in respect of capital expenditure or rent on account of the provision or the improvement of a public elementary school. Further, I am of opinion that, inasmuch as sub-s. 1 (*c*) is contained in a proviso to the first part of the sub-section, and the first part points out the way in which the expenses are to be met, the first direction being that they are to be paid out of the rates, sub-s. 1 (*c*) points to something which is to be charged on the parish instead of on the rates, whereas if sub-s. 1 (*c*) dealt only with expenditure out of capital one would have expected to have found it in a proviso to some enactment which dealt with the way in which the money was to be raised or, when raised, expended.

In my opinion sub-s. 1 (*d*) also confirms the view that when the Legislature was dealing with loans, money raised by means of loans, or raised for the purpose of capital outlay, apt phraseology was used, and I must therefore construe "capital expenditure" in sub-s. 1 (*c*) as meaning expenditure on capital account in improving a school or otherwise—expenditure which

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would be treated as capital expenditure, and not mere maintenance. I am therefore of opinion that this rule must be made absolute.

DARLING J. I am of the same opinion. The whole question really turns upon the true construction of the words "capital expenditure." Lord Robert Cecil on behalf of the respondent contends that capital expenditure means expenditure out of capital, and, further, that the word "capital" indicates the source from which the money is to come, and not the object on which it is to be expended. I am of opinion that his contention cannot be supported. I think that the matter becomes plain if sub-s. 1 (*a*) of s. 18 of the Act of 1902 is looked at. It says: "The county council may, if they think fit, ... charge any expenses incurred by them under this Act, with respect to education other than elementary, on any parish or parishes which, in the opinion of the council, are served by the school or college in connection with which the expenses have been incurred." Those words shew that the county council may charge the whole of the expenses upon the parish so far as those expenses are beneficial to the parish, and the words deal not only with what would be called expenditure on creating capital, but also with what would be in fact expenditure from day to day. The words seem to me to contemplate, among other things, the building of a school for the benefit of a parish, yet not within that parish, but somewhere else, and the maintenance of it not within the benefited parish. That might be done, and some of it certainly would have to be done, out of capital; but the test suggested by Lord Robert Cecil on behalf of the respondent cannot satisfactorily be applied to that instance. There appears to me to be the following distinction between the provisions of sub-s. 1 (*a*) and sub-s. 1 (*c*) of s. 18: If it is to be expenditure of which all the benefit is to be taken at once, the county council may under sub-s. 1 (*a*) charge it all on the parish; if it is expenditure on account of capital, i.e., "capital expenditure," in the sense in which I read it, they may charge half or three-fourths of it. Although sub-s. 1 (*a*) only applies to secondary education, I think that it shews what the scheme is. I am therefore of opinion that the meaning of the words "capital expenditure" is

not expenditure of money taken from capital, but the laying out of money which, upon its being laid out, becomes in itself capital. That is irrespective of the source from which the money comes. I therefore agree that this rule should be made absolute.

A. T. LAWRENCE J. I am of the same opinion. I think that sub-s. 1 (*c*) of s. 18 of the Education Act, 1902, was enacted to prevent a certain injustice that would otherwise arise under s. 18, sub-s. 1. The expenses of the council were to be defrayed out of the county or borough rate, as the case might be, and, inasmuch as some parishes would be well provided and others ill provided with schools, it would be very unjust to those which were well provided if they had to pay an equal proportion with the ill-provided parishes of the capital expenditure necessary to provide schools in those ill-equipped parishes. Consequently it was necessary, when dealing with the rate applicable to the expenses of the education authority, to make the provision contained in sub-s. 1 (*c*) of s. 18 of the Act of 1902, to the effect that when that expenditure was in respect of capital expenditure on account of the provision or improvement of any public elementary school, then as to not less than one-half or more than three-fourths it should be borne by the parish which was served by the school. The only construction I can place upon the words "capital expenditure" in that sub-section is that they mean what the expression ordinarily means. The word "capital" qualifies the character of the expenditure, and not the fund or source out of which it comes. It is the nature of the expenditure and the object on which it is spent which is referred to. I think that the sub-section so read is perfectly intelligible and means what it says. I do not think that it can have the meaning for which Lord Robert Cecil has contended on behalf of the respondent.

Rule absolute.

Solicitors for applicants: *Alpe & Ward, for H. J. Bracher, Maidstone.*

Solicitors for respondent: *C. Russell & Co., for Smallpeice & Co., Guildford.*

J. E. A.

K. B. D. 1906 *May* 17.
C. A. 1907 *April* 28, 29.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

THE KING *v.* THE ASSESSMENT COMMITTEE OF THE CITY OF LONDON UNION.

Poor Rate—Valuation List—Rateable Value — Statutory Exemption from Liability to Poor Rate—Insertion of rateable Value of exempted Premises —Mandamus to Assessment Committee—7 Geo. 3, c. 37, s. 51—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67).

By a reclamation Act of 1766 certain land then forming part of the bed of the river Thames was authorized to be inclosed and embanked by the owners of adjoining wharves and land, and the land so inclosed and embanked was to vest in them "free from all taxes and assessments whatsoever," an exemption which in *Sion College* v. *London Corporation*, [1901] 1 K. B. 617, was held to be limited to the poor rate and not to extend to the consolidated rate. In preparing the quinquennial valuation list for a parish in which certain of the exempted premises were situate, the overseers inserted their gross values in the appropriate column, but in the column for rateable value they inserted merely the word "exempt" without any figure of value; the list so prepared was adopted by the assessment committee. The Corporation of London, who as a rating authority were interested in the preparation of the valuation list as the basis for the consolidated rate, applied for a writ of mandamus to compel the assessment committee to insert the rateable values of the various properties in the appropriate column in the valuation list:—

Held (reversing the decision of a Divisional Court), that, assuming there was a duty in the assessment committee to insert the rateable values of the exempted properties in the valuation list, the Corporation as a rating authority had a right of appeal to quarter sessions under s. 32 of the Valuation (Metropolis) Act, 1869, and having an alternative and effective remedy, were not entitled to a mandamus; and, further, that, even if the Corporation had no statutory right of appeal under that section, the safeguards provided by that Act as a whole were amply sufficient to protect the interests of all parties interested, and the Court ought not, by granting a mandamus, to insert further safeguards in the Act.

Per Vaughan Williams and Fletcher Moulton L.JJ.: It was the duty of the assessment committee to insert both the gross and rateable values of the exempted properties in the valuation list.

Appeals from a judgment of the Divisional Court (Lord Alverstone C.J.: Bray J. dissenting) making absolute a rule for a mandamus obtained at the instance of the Corporation of

the City of London, and directed to the assessment committee of the City of London Union, calling upon them to shew cause why a writ of mandamus should not issue commanding them to insert in the quinquennial valuation lists for the years 1906—1911 for certain parishes in the City of London the gross and rateable values of certain hereditaments.

From the affidavits of the City solicitor and of the assistant overseer of the precinct of Whitefriars the following facts appeared :—

Pursuant to 7 Geo. 3, c. 37, certain lands on the north side of the Thames within the limits specified in the Act were inclosed, embanked and reclaimed from the river, and were vested in the owner or owners, proprietor or proprietors, of the adjoining wharves or ground "free from all taxes and assessments whatsoever." The reclaimed lands were situate in the parish of St. Ann, Blackfriars, the parish or precinct of Whitefriars, the parish of St. Andrew-by-Wardrobe, the parish of St. Bride, and the township of Bridewell, all within the City of London; and in the valuation lists in force from time to time in the said parishes and township under the Valuation (Metropolis) Act, 1869, no valuation of any kind of the land and buildings thereon had been entered as the rateable value thereof. The lands and buildings had always been described in the valuation lists, and a sum had been entered as the gross value; but instead of the rateable value being inserted the word "exempt," or some note indicating that the particular lands and buildings were exempt from rates, had been inserted in lieu of their rateable value. The Corporation, being desirous of having the rateable value of the lands and buildings inserted in the respective valuation lists, and being desirous of rating the occupiers of the lands and buildings to the consolidated and sewers rates levied by them under the City of London Sewers Acts, 1848, 1851, and 1897, took steps to have the proper gross and rateable values inserted in the quinquennial valuations which were being prepared for the different parishes, and a letter was addressed to the respective vestry clerks calling upon them to insert the values. With the exception of the overseers of the parish of St. Bride, none of the overseers of the respective parishes complied with the request.

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In the case of the valuation lists which the other parishes deposited with the assessment committee no figure of the rateable value of any lands or buildings, or of any lands reclaimed under 7 Geo. 3, c. 37, had been inserted. Notices of objection were accordingly served by the Corporation upon the clerk to the assessment committee in respect of each hereditament in three of the parishes, but the clerk to the assessment committee objected that the notices were invalid as not having been served within the statutory period. The assessment committee having refused to insert the respective rateable values except under an order of the Court, this rule for a mandamus was applied for; it was not opposed by the assessment committee, but was opposed by the overseers of Whitefriars and by several ratepayers who were owners or occupiers of some of the specified hereditaments, or of other property within the area of the City.

The effect of the insertion of the rateable values in the valuation list is dealt with in the following extract from the affidavit of the assistant overseer of the precinct of Whitefriars: "(3.) . . . . For a great number of years it has been the practice in making up the valuation lists of the City of London Union, as regards those premises which are by the Act 7 Geo. 3, c. 37, 'free from all taxes and assessments whatsoever,' not to insert any figure in the said lists as the rateable value of such premises, merely entering them in the said lists as 'exempt,' but a figure for the gross value of the said premises has always been entered in the said lists. (4.) The premises in question have been judicially held to be exempt from land tax, paving rates, and poor rates, and are not therefore affected by the provisions of the Metropolitan Poor Act, 1867. So far as any rates are payable in respect of such premises made under the City of London Sewers Act, 1848, and an Act of 1839 for regulating the police in the City of London, the necessary amounts have been from time to time ascertained by reference to and calculations made from the respective gross values appearing in the valuation lists for the time being. (5.) Having regard to the provisions of the Union Assessment Committee Act, 1862, the Metropolitan Poor Act, 1867, the Valuation (Metropolis) Act, 1869, the Local Government Act, 1888, the

London (Equalization of Rates) Act, 1894, the Education Act, 1902, and the Education (London) Act, 1903, the matter has become one of great importance to the parishes in which the premises exempted by the said Act, 7 Geo. 3, c. 37, are situated, inasmuch as by those Acts it is in effect provided that parishes in the metropolitan area should contribute to the common poor fund and the rates levied by the London County Council, including the equalization fund which was established by the said Act of 1894, in proportion to their total rateable value according to the valuation lists for the time being in force, and such contributions are all collected from the various parishes by means of precepts issued to the overseers thereof by the guardians of the poor of the said union. Thus, if the rateable value of the said exempted premises be inserted in the respective lists, the total rateable value of each parish concerned will be largely increased, with a resultant increase in the contribution to be made from the respective parishes in respect of the rates before mentioned, but without any corresponding increase in the amount of rates received in respect of property actually rateable in the respective parishes. Such a result would be manifest injustice both to the parishes concerned and to the individual ratepayers therein. (6.) As to the precinct of Whitefriars, the present total rateable value thereof is 30,931*l.* If such of the said exempted premises as are situate in the said precinct have their rateable value inserted in the valuation list for the said precinct, I estimate that the total rateable value thereof will be increased to 47,167*l.*, being an increase of 16,236*l.* on the present rateable value according to the valuation list as it now stands. I have calculated that the result, owing to such increased liabilities in respect of the rates referred to in the last paragraph, will be to raise the rates of the said precinct. For instance, for the six months ending March 31, 1906, the rates would be increased from 27·805*d.* in the pound, which equals 3583*l.* 9*s.* 8*d.* as they now stand, to 39·399*d.* in the pound, which would equal 5464*l.* 9*s.* 10*d.*, an increase of 11·594*d.* in the pound, which equals an increase during the six months of 1881*l.* 0*s.* 2*d.* rates to be paid by the ratepayers who are not exempt."

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The points argued in the Divisional Court were substantially that there was no power to compel the assessment committee to make alterations in the valuation list, and that to compel them to do so by a mandamus obtained by the rating authority would in effect be to give the rating authority a right of appeal which they did not possess by statute.

Cripps, K.C., Macmorran, K.C., and *Sylvain Mayer*, for the Associated Newspapers, Limited; *Avory, K.C.*, and *Courthope Munroe*, for the overseers of the precinct of Whitefriars; *Rowlatt*, for the Metropolitan Asylums Board; *Konstam*, for the proprietors of the *Daily Graphic*; *Cripps, K.C.*, and *G. M. Gathorne-Hardy*, for the South Eastern and Chatham Railway Company; and *C. B. Marriott*, for the Conservators of the River Thames, shewed cause.

Danckwerts, K.C., G. Cave, K.C., R. Cunningham Glen, and *Bethune*, for the Corporation of London, in support of the rule.

Marshall, K.C., and *Ryde*, for the assessment committee.

Cur. adv. vult.

1906. May 17. The following written judgments were delivered:—

BRAY J. This is an application by the mayor, commonalty, and citizens of the City of London to make absolute a rule for a mandamus to the assessment committee of the City of London Union directing them to insert in the quinquennial valuation list for the years 1906—1911 for certain parishes within the City the gross and rateable value of certain specified hereditaments which they allege are exempt from poor rates, but not from other rates; and for the purpose of my judgment I assume (without deciding) that the corrections in the valuation lists for which they ask are corrections that should be made. The assessment committee themselves are, I understand, willing to abide by the order of the Court, but the mandamus is resisted by the overseers of one or more of the parishes and by several ratepayers who are the owners or occupiers of the specified hereditaments, and in some cases of other hereditaments, in the City. It seems to me that there are at least two objections

that may be successfully taken to the application—first, that the assessment committee cannot be compelled to make this correction; secondly, that to compel them to do so at the instance of the rating authority is to give a right of appeal to the rating authority which the statute has not given them.

I will deal first with the first objection. The duty of the assessment committee in the metropolis is defined by s. 14 of the Metropolis Valuation Act, 1869, viz., to revise the valuation list in accordance with this Act and the Acts incorporated therewith. In order to see what this revision is, we must look at s. 7, which incorporates ss. 17 to 21 of the principal Act, that is, the Union Assessment Committee Act, 1862. The procedure after the overseers have deposited the valuation lists of the different parishes forming the union is that persons aggrieved may object (s. 18); that the committee shall hold meetings and hear and determine objections (s. 19); that the committee *may*, whether any objection be made or not, alter the valuation list, and *may*, with the consent of the guardians, employ a person to value, and when they have revised the list in this way they *shall* approve and sign the same (s. 20). An appeal lies from any decision of the assessment committee, and in practice the committee are the respondents in such an appeal. Under these circumstances, can the committee be compelled to make any alteration? It seems to me clearly not. They are bound to hear and determine objections. They *may*, without any objection having been made, make an alteration. If they do so, and if the alteration is objected to, they have to hear the objection, and, if there is an appeal from their decision, they have to appear in Court and defend it. It seems to me that their duty is to hear and adjudicate on objections, to consider whether outside the objections they shall make any alterations, and if they do this they have done their duty, whether their decision be right or wrong. They *may* make an alteration without an objection, but they are not bound to do so. They have not failed to do their duty here in any respect. They have at the instance of the applicants without formal objection considered whether they should make the alterations desired and have refused. They are perfectly entitled to do this, and if they have

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made a mistake the statute provides the remedy, viz., an appeal by such persons as the statute specifies. It seems to me that the applicants are asking the Court to construe "may" as "shall," and I see no reason for giving to the word "may" any but its ordinary signification. It is quite unnecessary to consider whether mandamus would lie to the overseers, because that is not the question here.

I now deal with the second objection. Counsel for the applicants contended that the Corporation, as the rating authority, represented the ratepayers as a whole, and had a right to have the valuation lists correctly made. The making of valuation lists is entirely regulated by statute, and in the metropolis the statute is the Act of 1869, to which I have referred, and the Acts incorporated with it, and this statute must be carefully examined. The mode of making the valuation list is as follows. It has to be made in the first instance by the overseers of the parish (s. 6). The overseers are the representatives of the parish, that is, of the ratepayers in the parish, and it is the duty of the overseers to insert all hereditaments that ought to be inserted in the valuation lists. By s. 8 the overseers are to send a copy of the valuation list to the surveyor of taxes, who is entitled to have a voice in fixing the gross values. The overseers have then to deposit the list and give public notice thereof, and after fourteen days they have to transmit it to the assessment committee. By s. 11 it is provided that objections may be made before the assessment committee by any person authorized by that Act or Acts incorporated therewith to object, "who feels himself aggrieved . . . . by reason of the omission of any matter therefrom." The importance of this section is that it gives every ratepayer aggrieved a right to object. The assessment committee has then, as before stated, to hear objections and to revise the list, inserting therein, if it thinks fit, any hereditament that has been omitted, and then to finally approve it and to sign at the foot a declaration of approval. The assessment committee is the representative of *all* the ratepayers in the union. They are appointed in some cases by the guardians and in others by the vestry, who are elected by the ratepayers.

With reference to this procedure for making and revising the valuation list, Lord Herschell, in *London County Council* v. *St. George's Union Assessment Committee* (1), says: "These are no slight precautions for securing a valuation according to law." Then follow sections giving the right of appeal, and again I quote Lord Herschell, who says (1): "Add to this that ample power of appeal is given to every one interested against any decision of the assessment committee, and I think I have said enough to shew that great precautions have been taken to secure a proper valuation of the hereditaments situate in the several parishes throughout the metropolis." So far no express power of intervention is given to the rating authority, unless it comes within s. 11; and I will assume (again without deciding) that the Corporation as the rating authority has no right under s. 11. Up to this point the Legislature has therefore not thought fit to give any voice to the rating authority, and the reason is plain, because the correctness of the valuation list has been, as Lord Herschell observes, amply secured by giving a voice in the compilation of the list—first, to the overseers, the representatives of all the ratepayers in the parish; secondly, to the surveyor of taxes, the representative of the income tax authorities; next, to the assessment committee, the representative of the whole body of ratepayers in the union; and, lastly, to every ratepayer in the union. What more is needed? What different interest has the rating authority from the assessment committee? Why should the ratepayers be doubly represented?

I think we ought to assume that up to this point the Legislature did not think fit to give the rating authority any right of intervention. I now turn to s. 32, which does refer to the rating authority. It gives to the assessment committee and to the overseers (with the consent of the vestry), and to any ratepayers in the metropolis, and to any body of persons authorized by law to levy rates, a right of appeal to quarter sessions if they or he feel aggrieved by reason of the *total* gross or *total* rateable value of any parish being too high or too low, or of there being no approved valuation list for such parish. It seems to me that this section strongly supports the contention that, apart from

(1) [1894] A. C. 600, at p. 604.

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this section, the rating authority as such has no locus standi. In other words, when it comes to totals they are to have a voice; when dealing with particular hereditaments they have none, and are intended to have none. I think that the decision in *London County Council* v. *St. George's Assessment Committee* (1) is strongly against the present applicants; the Corporation are practically in the position of the London County Council, and if no right of appeal is given to them by the statute, why is this Court to give them what is in effect a right of appeal? All the reasoning of Lord Herschell applies to a very great extent to the question we have to determine here. Again, the tribunal to whom the jurisdiction to decide all these appeals has been assigned by statute is the assessment sessions, not the High Court; but if we grant the mandamus the disputed facts, if there are any, may have to be tried on the return by a jury.

All these considerations seem to me to point to this. The Legislature has provided a remedy if a mistake is made, and if they have not given the rating authority a remedy—and I assume for the purpose of this case that they have not—it is because they thought they had already protected every person interested, and it was unnecessary to do more. This Court ought not to give a remedy which the Legislature has advisedly not given; I say "advisedly," because where they thought the rating authority ought to have the power of intervening they have by s. 32 given it that right. On these two grounds this Court, in my opinion, ought to refuse the application.

I have considered the question whether we ought to make the rule absolute in order to enable the points to be raised on the return. As there is an appeal from our decision, and all the facts appear by the affidavits and are not in dispute, I think that to do so would be putting the parties to a quite useless expense.

If I had not decided this case in favour of the respondents on the grounds mentioned, I should have had to consider whether this was a case where the Court, in the exercise of its discretion, ought to direct a mandamus to issue. There are, I think, reasons why it should pause. If the correction is made in the valuation list, the ratepayers affected ought to have a right of appeal.

(1) [1894] A. C. 600.

The time for appealing is past, and I am not satisfied that they would have that right; at all events, it is a right of appeal which could be seriously contested, instead of the clear right of appeal given by the statute, and they would be prejudiced. Then is there any such crying injustice that it needs to be remedied at once? It has existed since 1848, and none of the parties interested have tried to remove it. It can be remedied four years hence, because the Corporation are ratepayers, and as such have a clear right of objection and appeal. It is said that they are not applying here as ratepayers; that may be so, but it is the same body acting through the same Court of Common Council. Lastly, when the valuation list was published, the Corporation took the directly opposite course of objecting to the insertion of the values in the St. Bride's list (the only case in which the values had been inserted) and procured the overseers to strike them out. However, I do not decide the case against the applicants on this ground; I base my decision on the two points I have already mentioned, and in my opinion the rule should be discharged, and with costs. I understand, however, that I have the misfortune to differ from my Lord, whose experience in these matters is much greater than my own; I have therefore to withdraw my judgment.

In the second case the application is confined to the parish of St. Bride, where the overseers did insert the hereditaments, but struck them out on the objection of the applicants themselves. I cannot see how we can grant a mandamus here. The mistake has been procured by the Corporation itself. All the reasoning in the other case applies a fortiori here, and I think the rule ought to be discharged, but for the same reason as in the first case I withdraw my judgment.

LORD ALVERSTONE C.J. In these cases rules were granted directed to the assessment committee of the City of London Union calling upon them to shew cause why writs of mandamus should not issue directed to them to insert the gross and rateable values of certain properties in the parishes of St. Ann, Blackfriars, St. Andrew's-by-Wardrobe, Bridewell, and St. Bride. Notices of the rules were given to the overseers of the various

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parishes and to the occupiers of the hereditaments in question. Counsel for the assessment committee did not shew cause upon the merits, but admitted that the gross and rateable values of the properties in question ought to appear in the valuation lists. Cause was shewn by counsel on behalf of the overseers and on behalf of the owners or occupiers of some of the hereditaments.

The valuation lists in question were deposited by the overseers on June 1, 1905, and the time limited by the statute for objecting before the assessment committee expired upon June 26. Prior to this date, on June 23 the Corporation, as occupiers and ratepayers of certain property in the parish of St. Bride, had objected to the insertion of the hereditaments, of which they were the occupiers, in the valuation list of that parish, and, upon their objection, the gross and rateable values of the properties in question had been struck out. Prior to the making of the valuation list in question it had not been the custom to insert in the valuation lists prepared for the purpose of the poor rate under the Metropolis Valuation Act, 1869, the gross or rateable values of the properties which were entitled to exemption. Under the Blackfriars Bridge Act (7 Geo. 3, c. 37) the names of the properties were inserted, but "exempt" was written against them. But it seems clear that, since the decision in *Sion College* v. *Corporation of London* (1), the gross and rateable values of such properties should appear in the valuation lists, inasmuch as these values may be required for the purpose of the consolidated rate.

In my opinion the argument urged on behalf of the overseers, that if the values were inserted it would create a difficulty under s. 14 of the Metropolis Valuation Act, 1869, with regard to the addition of totals, is not well founded; an entry upon the valuation lists shewing that any properties were exempt from the poor rate would enable the matter to be dealt with by excluding their values from the totals, if such totals should only include the gross and rateable values of properties liable to be assessed to the poor rate. If, therefore, these rules had been moved, directed to the overseers, prior to the deposit of the lists, there would not in my opinion be any answer to them, and in

(1) [1901] 1 K. B. 617.

this connection it must not be overlooked that the Corporation were aware, certainly by May 25, if not earlier, that the overseers refused to insert the gross and rateable values in question, and, as I have already said, in the case of one parish they objected to the insertion of the values. After the deposit, alterations in the list can only be made by the assessment committee pursuant to the provisions of the Union Assessment Committee Acts, 1862 and 1864, and of the Metropolis Valuation Act, 1869. It was contended that the power of the committee under s. 20 of the Act of 1862 and ss. 11 to 14 of the Act of 1869 was discretionary, and that the writs of mandamus ought not to issue directing them to insert the gross and rateable values of any hereditaments. I cannot altogether concur in this view. The duty of the overseers being to insert the gross and rateable value of every hereditament, and the assessment committee being ordered by s. 13 of the Act of 1869, in the event of the overseers failing to submit such valuation lists as are required by the Act, to provide some person to make the valuation lists, in my opinion if the gross and rateable values are improperly omitted from any list there is a duty upon the assessment committee to insert them which is capable of enforcement by mandamus.

It was, however, further contended by counsel for the owners and overseers that the remedy of the corporation is under s. 11 of the Act of 1869 to make objections before the assessment committee as being persons aggrieved by reason of the omission or the incorrectness of the value of any hereditament in the valuation list, or by reason of the omission of any matter therefrom, and that under that section and s. 18 of the Union Assessment Act, 1862, the Corporation could have raised the point by objection before the assessment committee, and if necessary by appeal. But for the expressions of opinion of Kay L.J. in *London County Council* v. *St. George's Assessment Committee* (1), I should have thought that the Corporation, as a rating authority, were entitled to raise objections to the valuation list. The point was not decided in the House of Lords. There are

(1) [1893] 2 Q. B. 476, at p. 497; reported sub nom. *Reg.* v. *Justices of County of London and London County Council.*

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some passages in the judgment on appeal of Lord Herschell (1) which rather tend to support the view that as a rating authority they would not have the right to take proceedings by way of objection and appeal against the value of particular hereditaments. A further difficulty is no doubt created by the fact that the time for appealing was allowed to go by, and it is by no means clear that the machinery of the Act for deciding any question of amount, should there be a dispute as to the gross and rateable values, can now be put in force. In my opinion, however, at the time when these rules were granted and served, that is, on July 31, 1905, the assessment committee were still in a position to deal with the valuation lists, and, having regard to the doubts which arise as to their right of appeal, I think the Corporation have sufficient interest to justify their application for writs of mandamus to compel the assessment committee to do that which they ought to have done. I think, therefore, that these rules should be made absolute, and that if any objections can be raised upon any of the grounds which have been urged before us they should be raised by return, when the matter can be tested more formally and satisfactorily than it can by the argument of the rule nisi.

The Court being divided in opinion, Bray J., as the junior judge, withdrew his judgment, and the rules were made absolute.

The overseers of Whitefriars and the opposing ratepayers appealed.

1907. April 28, 29. *Cripps, K.C.*, and *Sylvain Mayer* (*Macmorran, K.C.*, with them), for the Associated Newspapers, Limited. The rateable values of the exempted properties ought not to be inserted in the valuation list; but, assuming that they ought to be inserted, the duty to insert them ought not to be enforced by mandamus. The difficulty is to some extent the result of the decision in *Sion College* v. *Corporation of London* (2), that, although under 7 Geo. 3, c. 37, the reclaimed land and properties were exempt from poor rate, the exemption did not extend to the consolidated rate. The quinquennial valuation

(1) [1894] A. C. 600. (2) [1901] 1 K. B. 617.

lists were made in the ordinary way; there was no appeal against them, and they are final for all purposes as regards valuation. If, indeed, there was any right of appeal, and it is submitted that there was none, the mandamus was not applied for until the time had passed for an appeal to the assessment committee, which must precede an appeal to the quarter sessions. The Corporation are not taking these proceedings as ratepayers, but as the rating authority; they cannot as such interfere with the rateable values in the valuation list, although they have the right under a special statute to appeal against the totals of the gross and rateable values for a parish. As an outside authority, with no right of appeal as to the valuation list, the Corporation cannot, in order to alter the list, obtain a mandamus which is in substance an appeal. The case of *London County Council* v. *St. George's Union Assessment Committee* (1) defines clearly the position of a rating authority; it cannot object to the assessments of particular properties as being too high or too low, but can only deal with the totals. The result of inserting the rateable values of the exempted properties in the valuation list would be that the amount of the precept to the parish would be increased, with the further result that persons not exempted would have to pay more than their fair share of the total rates. It is a fundamental error to suggest that the rating authority has any interest in the present matter, for they have no statutory power of interference; the Corporation, as rating authority, has no public duty to perform as regards the insertion of these values in the valuation list, and being in the position of outsiders, with no right of appeal, they are not entitled to a mandamus. It is not a case of omission of properties from the list, for the gross values are in all cases inserted; and there is no injustice, for, although exempt from poor rate, the exempted properties in fact pay the consolidated rate.

Avory, K.C., and *Courthope Munroe*, for the overseers of the precinct of Whitefriars. The overseers are interested, not as individual ratepayers, but in regard to the totals of the different parishes. Against totals which are too high or too low the rating authority has another effective remedy by appeal, and where that remedy exists a mandamus will not be granted. If the mandamus

(1) [1894] A. C. 600.

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were to go, its effect would be to automatically raise the totals of this parish, which could not then be altered for four years, and it would put the Corporation in the same position as if they had appealed and had succeeded in the appeal. "Rateable value" in the Act of 1869 means the rateable value of a hereditament liable to be rated.

Rowlatt, for the Metropolitan Asylums Board.

Konstam, for H. R. Banes & Co. These appellants are ratepayers in the parish of St. Bride, and the Corporation are ratepayers in the same parish. The Corporation cannot take up separate positions as ratepayers and as a rating authority. As ratepayers they had the right of objecting to the valuation list, but did not exercise it. The time for such an objection is limited to twenty-five days, and expired on June 25; on June 23 the Corporation gave notice of an objection to the rating of their own property, which was considered and acted upon; but it was not until July 17 that they gave notice of objection to our properties or other exempted properties being entered in the rateable value column as "exempt" without any figure of rateable value against them. The right to object to the valuation list in the metropolis arises under s. 7 of the Valuation (Metropolis) Act, 1869, which brings into operation ss. 17, 18 and 19 of the Union Assessment Committee Act, 1862, and by s. 19 of the latter Act the assessment committee is not to hear an objection to the valuation list unless notice of objection has been given. The words are mandatory, and their effect is that the assessment committee cannot hear any objection of which notice has not been given without the consent of the overseers of the parish affected. [He also cited *Reg.* v. *London Justices* (1); *Anderson* v. *Plomesgate Union.* (2)]

Cripps, K.C., and *G. M. Gathorne-Hardy*, for the managing committee of the South Eastern and Chatham Railway Company.

C. B. Marriott, for the Conservators of the River Thames.

Danckwerts, K.C., and *G. Cave, K.C.* (*R. Cunningham Glen* and *A. A. Bethune* with them), for the Corporation of London. The mandamus was rightly granted. By s. 45 of the Valuation

(1) [1897] 1 Q. B. 433.

(2) (1906) Unreported.

(Metropolis) Act, 1869, a valuation list is deemed to have been duly made, and to be conclusive evidence of gross and rateable values and of the fact that all the hereditaments in a parish are inserted in it. The necessity of coming to the Court turns on that section, for if the rateable value of hereditaments is not included in the valuation list the Corporation cannot rate them to the police, sewers, and consolidated rates, from which they are not exempt: *Sion College* v. *Corporation of London.*(1) Even if a particular property is exempt from payment of rates, its gross and rateable values ought to appear in the valuation list: *Reg.* v. *Foundling Hospital.*(2) Any possible chance of injustice will be avoided by the insertion of a note of exemption in the valuation list, or by the insertion of two totals, as directed in *Saffron Hill Overseers* v. *Holborn Union.* (3) It is not a good objection to say that there is no jurisdiction to grant a mandamus because it is in the discretion of the assessment committee to say whether they will make an alteration in a valuation list. It is true that s. 20 of the Act of 1862 says that the assessment committee "may" make such alteration, but s. 14 of the Act of 1869, which applies to the metropolis, says that they "shall" revise the list. Supposing the assessment committee were to approve a valuation list without alteration; in such a case the Corporation would have as a rating authority no right of appeal.

[BUCKLEY L.J. It is curious that, if the statute carefully excludes you from questioning the proceedings by way of appeal, you should have a right to question them by mandamus.]

It is because the Corporation has no other remedy for the non-performance of its duty by the assessment committee that it ought to have a mandamus. Where there is a clear breach of duty by a public body, the performance of which would be to the benefit of the person or body complaining, mandamus is the appropriate remedy.

It must be remembered that, as the Corporation make the consolidated rate, they have an interest in getting the name of every tenant properly inserted in the valuation list; for as s. 45 of the Act of 1869 makes the valuation list conclusive evidence of

(1) [1901] 1 K. B. 617.
(2) (1871) L. R. 7 Q. B. 83.
(3) (1881) Ryde's Metropolitan Rating Appeals (1871—1885), p. 283.

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the gross and rateable values, and also of the fact that all hereditaments are inserted, they would lose the rates on hereditaments wrongfully omitted. The provision in s. 51 of the Act of 1869 that a valuation list shall include every hereditament in the parish is most important, for it shews that, if the overseers omit any hereditament from the list, there is a clear breach of duty on their part. Neither the assessment committee nor the overseers have anything to do with exemptions from payment of rates, and the assessment committee has nothing to do with the question of whether premises are rateable. The overseers having failed in their duty to the Corporation, and thereby prevented them from making the rate which they ought to make, s. 14 of the Act of 1869 shews that it then became the duty of the assessment committee to do that which the overseers ought to have done; they have judicial functions to perform in the settlement of the valuation list.

[FLETCHER MOULTON L.J. Can they alter the valuation list after having once approved it?]

Yes; *Rochester Corporation* v. *Reg.* (1): the Court can order it to be done nunc pro tunc. [They also cited *Reg.* v. *Ingall* (2); *Julius* v. *Bishop of Oxford* (3); *Reg.* v. *Hannam* (4); *Reg.* v. *London Justices* (5); *Reg.* v. *Hammersmith Overseers* (6); *Reg.* v. *Woolwich Union* (7); *Reg.* v. *Justices of General Assessment Sessions* (8); *Reg.* v. *Malden Overseers.* (9)]

Marshall, K.C., and *H. R. Ward*, for the assessment committee, did not take part in the argument.

Avory, K.C., in reply.

VAUGHAN WILLIAMS L.J. This is a case of considerable difficulty, but I do not think that anything would be gained by taking time to consider our judgments. The first question that we have to decide before we can say whether a mandamus ought to issue to order the assessment committee to perform the

(1) (1857) 7 E. & B. 910; (1858) E. B. & E. 1024.
(2) (1876) 2 Q. B. D. 199.
(3) (1880) 5 App. Cas. 214.
(4) (1886) 34 W. R. 355.
(5) [1893] W. N. 86.
(6) (1859) 7 W. R. 524.
(7) [1891] 2 Q. B. 712.
(8) (1886) 17 Q. B. D. 394.
(9) (1869) L. R. 4 Q. B. 326.

duty of inserting the various hereditaments comprised in this case in the valuation list as regards their gross and rateable value is whether there was a duty in the assessment committee to insert the hereditaments in the proper columns, that is, among others, in the columns for gross and rateable value. I am disposed to take the line taken by Bray J. in the Divisional Court, and to say that for the purpose of my judgment I will assume that there was that duty in the assessment committee. But, although it might be sufficient for the purposes of this judgment to take that course, and notwithstanding the rule against deciding points which it is not absolutely necessary to decide, I cannot refrain from saying that I am disposed to think that the duty does exist; it is difficult to read this Act of Parliament, and in particular s. 45, which provides for the cases in which the valuation list is to be final, without feeling that a strong prima facie case is raised that the valuation list should include all hereditaments which are liable to be rated without any exemption in respect of the various rates mentioned in sub-ss. 1, 2 and 3 of that section. I think that any one would prima facie come to the conclusion that the valuation list under s. 45 ought to comprise the gross and rateable values of hereditaments which, although exempt from the poor rate, are nevertheless to pay rates raised under the Acts of Parliament mentioned in those sub-sections. I may observe in passing that it was at one time contended before us that there was in respect of certain rates, for instance the sewers rate, a power of assessment in the Corporation itself under The City of London Sewers Act of 1848, and that, even if the hereditaments ought not to be inserted in the valuation list made under the Act of 1869, there would be the means of assessing them to rates other than poor rates under the Act of 1848. But that contention was abandoned, and properly so, because s. 77 of the Act of 1869 seems to shew that the power of assessment given to the Corporation by the Act of 1848 is no longer operative. It is unnecessary to say more on the first point, for whichever way it is decided I am of opinion that this mandamus ought not to issue.

Assuming, then, that the duty exists, the next question is one which has been treated during the argument as a simple

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question—Aye or No, is there a right of appeal? I do not think that in that form the question is accurately put. Lord Mansfield dealt with it as a question whether there was another remedy apart from a writ of mandamus, and I propose to ask myself whether there is such a remedy in the present case. With regard to the remedy by mandamus generally, we must not assume that the Legislature contemplated that, as a matter of everyday procedure, the provisions and the intention of a statute were to be worked out by having recourse to writs of mandamus. Mandamus is a remedy to be used in cases where it appears that unfortunately the Legislature has not, within the scope of a particular Act of Parliament, made provision for working out the system specified in that Act.

Let me now consider whether an appeal is given by this Act. The appeal section is s. 32, which is in these words: "Any ratepayer and any surveyor of taxes, and any overseer, with the consent of the vestry of his parish, who may feel aggrieved by any decision of the assessment committee, on an objection made before them to which he was a party, or by any decision of special sessions, whether he was a party or not, may appeal against such decision to the assessment sessions. Any assessment committee in the metropolis, or in the county in which the parish to which the appeal relates is situate, any overseers in the metropolis or such county, with the consent of the vestry of their parish, any ratepayer in the metropolis or such county, and any body of persons authorized by law to levy rates or require contributions payable out of rates in the metropolis or such county, may appeal to the assessment sessions, if they or he feel aggrieved by reason (1.) of the total of the gross value of any parish being too high or too low; (2.) of the total of the rateable value of any parish being too high or too low; or (3.) of there being no approved valuation list for some parish." It seems plain that the rating authority had an appeal as to matters in which they were themselves concerned. And there were two sets of matters in which they had an appeal—first, where there is something in the valuation list which affects the individual and the particular property; and, secondly, where there is something which affects the union itself. That being so, do

any of the matters involved in this case fall within the subject-matters of appeal mentioned in s. 32, sub-ss. 1, 2, 3? In sub-s. 1 the appeal is given by reason of the total of the gross value of any parish being too high or too low; in sub-s. 2 by reason of the total of the rateable value of any parish being too high or too low; and in sub-s. 3 by reason of there being no approved valuation list for some parish. I am inclined to think that in the present case the rating authority had a right of appeal, not only in respect of sub-s. 3, but also in respect of sub-s. 2. With regard to sub-s. 3, it was urged for the respondents that in construing the words "by reason of there being no approved valuation list for some parish" the stress ought to be placed on the word "approved," and that if the assessment committee approved in statutory form the valuation list after hearing and disposing of the objections taken by persons entitled to object, there was no appeal because there was an approved valuation list, and that it was not the less an approved valuation list (if approved in the statutory form by those who had to approve it) because it happened to contain mistakes or irregularities in detail. On the other side it was urged that if a valuation list did not follow the principles which should in kind be followed by an assessment committee in making up the list (as distinguished from their not properly carrying out the intention of the Legislature as to particular hereditaments), there was really no valuation list at all, and therefore necessarily no approved valuation list. Mr. Danckwerts had to admit that to a considerable extent that was true, for he admitted that if a valuation list did not contain columns for the insertion of gross and rateable values, or was in such a form that it contained no figure, either actually or inferentially, from which the statutable deductions could be made, there would be no valuation list at all, and of course no approved list. But Mr. Avory in his turn called our attention to the provisions of s. 51, which provides that the valuation shall be in accordance with the form given in Sched. II., and is in these terms: "The valuation list shall be made out in the form given in the Second Schedule to this Act. The overseers shall not include in such valuation list any hereditaments (except tithes or payment in lieu of tithes) which

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are charged according to Rule 2 in s. 60 of the Income Tax Act, but shall include tithes and payments in lieu of tithes and every hereditament in their parish, and shall enter every hereditament in the valuation list in accordance with the classes mentioned in the Third Schedule to this Act, so that the deductions to be made in ascertaining the rateable value may be calculated in accordance with that schedule." Then the Act provides for the addition of the totals of the columns, and in Part I. of the Second Schedule are to be found a form for the valuation list, a form of approval, and then a note in these terms: "The two last of the above columns (for gross and rateable value as determined by assessment committee) must be filled up, and the totals of those columns must be added up after the objections to the alterations have (if any) been heard, and before the list is finally approved." It seems to me that under those circumstances, having regard to the word "must" in the note, that a valuation list cannot be an approved list unless it complies with the terms of that note. Speaking for myself, I also thought that, reading s. 20 of the Act of 1862 and s. 35 of the Act of 1869, it was obviously intended that an appeal should lie to justices in special sessions after the signatures of three members of the assessment committee had been appended to the valuation list, and that led me to think that the Legislature could not have contemplated that the presence of the statutory signatures should take away from the justices in petty sessions the power which is given to them by s. 35 of appointing a proper person to make a valuation list. When we consider what that power really means, it is remarkable that the assessment committee have a similar power in cases where the list presented to them by the overseers is not in proper form. Taking all these matters into consideration, I have come to the conclusion that the words "by reason of there being no approved valuation list" are such as to give a right of appeal in a case where there is no approved valuation list, not because there has been no signature by three members of the assessment committee as required by the statute, but because in a case where there is such a signature the list is not made in a way to satisfy the statutory requirements, with the result that there is no list in the sense of there being no approved list.

I am far from saying that there is no right of appeal under sub-s. 2 by reason of the total rateable value of any parish being too high or too low; indeed, I think that there is an appeal in respect of those matters, and for this reason. There is no dispute that in a case like the present the insertion of these hereditaments in the column for rateable value will, and indeed must, have an effect, not upon the individual ratepayer, but upon the rating authority and upon the contribution of the parish as a whole to the rates. That being so, it seems to me that the rating authority have here an appeal by reason of the total rateable value of the parish being too high if the rates remain as they are now, because in respect of these rates, which are poor rates, the individual appellants are exempted from payment, and the consequence would be that too heavy a burden would be cast upon each parochial unit. I need not go at any length into what would be the result in practice. I am disposed to think that, if we take the rateable value column as it appears now and determine that the insertion of the word "exempt" in that column is wrong, and that the actual rateable value ought to have been inserted, then, although the total of the rateable values must be treated as a rating entity distinct from the items which go to make up that total, it must be possible in some way or other to adjust the hardship which would arise in such a case.

Two cases were cited to us in argument—*Reg.* v. *Hammersmith Overseers* (1) and *Reg.* v. *Malden Overseers* (2)—which decided that unoccupied houses, in respect of which rates could not be levied, must be inserted in the valuation list, and in which it was assumed that this would really create for a time effectively the very hardship with which we are now dealing. I am not sure whether those decisions apply in the present case, for there is this manifest distinction between them, that they deal with hereditaments which at some time or other must become liable to the payment of poor rate, whereas here the hereditaments are exempt from that rate, and there is no time at which they would become liable to pay it; but, however the question is to be worked out, it does not seem to have much bearing on the question of whether the mandamus should go. If the mandamus

(1) 7 W. R. 524. (2) L. R. 4 Q. B. 326.

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goes, and the columns are filled up, the question will still remain whether the parishes in which these hereditaments are situated are to suffer this hardship for the whole quinquennial period, and whether the individual ratepayers in the parishes affected are to be compelled to pay a larger sum than they would have to pay, by reason of some of the properties being included as rateable hereditaments, and therefore helping to fix the amount of the contribution of persons who are relieved from the payment of rates other than poor rates.

But I do not, as I have already said, propose to deal only with the question whether there is a right of appeal, for, even if no such right exists, there may still be a practical remedy, and the existence of such a practical remedy really forms the basis of the judgment of Bray J. in the Divisional Court. Assuming that there is no right of appeal, that fact does not necessarily lead us to the conclusion that a mandamus ought to issue, for the Legislature may well have provided that which it intended to be a sufficient and convenient remedy. If we look at the statutes dealing with these matters we find that, while they lay down with great care the system of rating to be pursued by the assessment committee and make elaborate provision for the steps which the committee are to take, they also obviously provide safeguards for the different persons and bodies interested, and in certain cases give a right of appeal, as, for instance, a right of appeal in cases where mistakes have been made, or where some person or body has been aggrieved by the insertion or omission of figures in the valuation list. Assuming that these statutory rights of appeal do not cover this particular appeal by the rating authority (though personally I think that they do cover it), it nevertheless seems to me a reasonable conclusion that in an Act of Parliament drawn with such elaborate detail as the one which we are considering the Legislature meant to say, "We think that the interests of every body of persons are sufficiently guarded by the rights of appeal given to the individual ratepayers and overseers and others, and we mean that those shall be the rights of appeal and no more." The Legislature may well have thought it sufficient to give a right of appeal to those primarily interested—owners, occupiers, ratepayers, and overseers—and that there was

no reason for giving extended rights of appeal. Even in the metropolis the valuation list must be prepared afresh every five years, and outside the metropolis it must be done year by year; and under these circumstances, when dealing with the Valuation (Metropolis) Act, 1869, and with the quinquennial period, it seems reasonable for the Legislature to say that, bearing in mind the short-lived operation of the Acts under which assessment committees have to proceed in order to arrive at a basis of rating, it is undesirable to give more appeals than are absolutely necessary for the protection of the ratepayers and other interested parties. Under those circumstances, in considering whether this mandamus ought to go, I ask myself this question: Is there a sufficient and convenient remedy to be found in the Act of Parliament, even on the assumption that no specific right of appeal is given to the Corporation of London as a rating authority? The answer that I give to that question is this: Taking the Act of Parliament as a whole, I see that ample powers of appeal are given to those primarily interested, and in my opinion the Legislature thought that they provided an amply sufficient remedy for any mistakes or difficulties likely to arise in the making of a valuation list. I am therefore of opinion, first, that this mandamus ought not to go, because I think that the case is one in which the Corporation, as a rating authority, had a power of appeal if they had wished to exercise it; and, secondly, that, even if they had not that power of appeal, the reasonable reading of this statute is that the Legislature thought that the remedies by way of appeal given to those primarily interested were sufficient for the purpose of doing justice, especially where the assessment was only to operate for a limited time.

I need only add that I have felt predisposed to come to this conclusion, because at present I am unable to see any clear course which would be open to the appellants if the mandamus were to go and the assessment committee were to amend the valuation list by the insertion of the various figures in their appropriate columns; I do not see how the ratepayers who might be aggrieved thereby would have any remedy, the time for an appeal by them having long gone by. I do not say that they could do nothing after the mandamus had gone and had been

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acted upon by the assessment committee, but it is certainly not clear, although there would in that case have to be a re-deposit of the valuation list, that these appellants would have any opportunity of getting anything altered in respect of which they might consider themselves aggrieved. I may say that, although I have arrived at a different conclusion from that arrived at by the Lord Chief Justice, it is obvious that he was very much pressed with the view expressed by Bray J., and I wish to express by my judgment my affirmance of the views of the latter learned judge.

FLETCHER MOULTON L.J. I am of the same opinion. Rates in England have been created at different dates for different and special purposes, and the circumstances of their creation led to their being placed in the hands of different bodies, who had the power of assessing and rating for those special purposes. This led to great inconvenience and confusion, especially in the metropolis, and the Act which we have here to construe, the Valuation (Metropolis) Act, 1869, was intended to prevent that confusion by the substitution for these many and rival assessments of one single assessment to be used for the purpose of all statutably authorized rates. That being so, it is necessary to bear constantly in mind that this Act does not deal with the poor rate alone, but that it is an Act providing for an assessment which shall (if I may use the expression) treat all rates alike, and accordingly we find in the definition clause that the word "hereditament" is defined to mean "any lands, tenements, hereditaments and property which are liable to any rate or tax in respect of which the valuation list is by this Act made conclusive." On turning to s. 45, which enumerates the rates for which the assessment made under the Act is to be conclusive, we find a long list of rates, which includes, not only the poor rate, but also "the police, sewers, consolidated and other rates in the City of London." Sect. 51 further provides that the valuation list shall include every hereditament in the parish. We therefore start with the provision that every hereditament in the parish which is liable for any rate in that long list of rates (which includes substantially all the existing rates in the metropolis) is to appear in the valuation list.

When we look at the provisions which relate to the contents of the valuation list, we find that the hereditaments which appear in it are to be assessed at their gross annual value and also at their rateable value, and that these two values are to appear in two separate columns of the valuation list. It is unnecessary to refer to the definition of "gross value," but "rateable value" is defined as meaning "the gross value after deducting therefrom the probable annual average cost of the repairs, insurance and other expenses as aforesaid." In other words, the expression "rateable value" is not to be taken to imply a liability to be rated, but is merely the gross value subject to certain deductions. When we consider that the object of the statute was to set up one assessment for all purposes, it becomes possible to understand why the definition of "rateable value" does not involve any liability to be rated, because the essential characteristic of property which is liable to be rated to one rate is not necessarily identical with that of a property which is liable to be rated to another rate. So that, although the phrase "rateable value" is used in the statute, the valuation list to be made under it consists of every hereditament which is liable to any one or more of the rates; the gross value is to be its gross value according to the definition, and the rateable value is to be this gross value after making certain deductions; while the question of liability to payment of any rate is left to be controlled entirely by the statutes which impose or regulate that particular rate, and is not in any way controlled by this Act, which deals simply with valuation. In case any doubt should remain as to this being the intention of the Act, s. 54 provides that all exemptions from rates and all special privileges with regard to the mode of valuation are preserved. We may, therefore, in considering the present case, banish from our minds all questions of liability to pay rates, and we may look upon the statute as being merely an Act for the purpose of getting at the gross value, and at the gross value subject to certain deductions, of every hereditament in the parish which is liable to any of the rates in question.

This being so, the first question I ask myself is whether the rateable value of these particular hereditaments ought to have

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appeared in the valuation list. It is not contested that the hereditaments themselves were properly inserted, for they were liable to the consolidated rate, which is one of the rates mentioned in the Act. The hereditaments being there, it is clear that their gross value ought to be inserted; that is necessary for purposes of the income tax. It is further clear that the rateable value ought also to be there, for that is the gross value subject to deductions; and the directions of the statute are explicit that the gross and rateable values should appear in the valuation list. The fundamental mistake of the assessment committee in the present instance appears to have been that, in drawing up this valuation list, they directed their attention solely to one particular class of rates, that is, poor rates or rates levied on precisely the same basis as poor rates. If they had realized that the valuation list was intended to be a general valuation in which properties liable to rates of any kind were to be treated alike and were to have their gross and rateable values inserted, they would never have left out these properties and have contented themselves with inserting the wholly insufficient excuse that the properties were exempt, when in truth the exemption extended only to one particular class of rates, viz., the poor rate. In my judgment, therefore, the rateable value of these properties ought to have been inserted in the valuation list.

The next question is whether the Corporation could at the time have instituted proceedings to require the correction of the valuation list in this respect. The position of the Corporation with regard to it is that it is the rating authority of the City of London and collects the rates payable in the City, and it has to use for the purpose of collection this valuation list, which is by statute made conclusive as regards all these rates. It seems to me most improbable that the Legislature, in arranging the procedure for the settlement of the valuation list, should have entirely muzzled the body which is most interested in the completeness of the list. It is the body which has to act upon it, and if the list is imperfect and does not give the rateable values of the several properties, how can the rating authority collect the rates in respect of those properties? The question whether the rateable values are correctly assessed is a very

different matter, and creates no difficulty to the rating authority. They are entitled to rely upon the assessments appearing in the list, and are not responsible for their accuracy. But if the list contains no statement as to what is the gross or as to what is the rateable value of a property, they have nothing on which they can act for any purpose for which such an assessment is required; they are in a difficulty as to the proper course to take. In the present case large gross values are inserted in the list against these particular properties, and as the insertion as to their rateable values is not that they are "nil," but that the properties are exempt (and exempt, be it said, only from a particular rate), I feel that when that valuation list was in process of settlement the Corporation must have known that it was imperfect and that they could not act upon it in the performance of their duties as a rating authority.

I approach the consideration of this statute in the expectation of finding that some procedure will be provided therein for enabling a rating authority to object that the valuation list does not contain the necessary statutable figures to enable them, as a rating authority, to act. And in my opinion it is so. Upon examining the Act, it appears to me that s. 32 gives an adequate remedy to the rating authority, and enables it to secure that such defects in a valuation list shall be remedied. As regards sub-s. 2 of that section, which empowers a rating authority to object when the total of the rateable value of any parish is too high or too low, we are of course bound by the decision of the House of Lords in *London County Council* v. *St. George's Union* (1) that it does not empower a rating authority to go into the assessments of particular properties and to quarrel with them if it considers them too high or too low; it can only deal with the totals. But where an assessment committee, in settling a valuation list, has treated a whole class of properties as being properties with regard to which no rateable values need be inserted, and has thus acted upon a principle which has led it to leave a portion of its work undone, which portion directly and necessarily affects the totals by making them too low, I am of opinion that the rating authority can, under s. 32, sub-s. 2,

(1) [1894] A. C. 600.

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bring such a matter before the assessment sessions. I am fortified in that view by the provision in s. 20 to the effect that where before the justices in special sessions there have been alterations in individual items which affect the total, these alterations shall form a reason for appeal against the totals to the assessment sessions. This shews that where something has been done which affects the totals, the rating authority, acting in defence of the rights of the parish, has, as it ought to have, power to go to the assessment sessions and get the requisite alterations made in the valuation list.

I am of opinion also that under sub-s. 3 of s. 32 the Corporation, as rating authority, could have complained of this valuation list. It is clear that the valuation list of every parish is to be a list of the gross and rateable values of all the hereditaments comprised in it; and if properties appear therein with regard to which those valuations are left out, there is a defect in the essential particulars of the list. This defect is not in the nature of an erroneous decision as to value, but is an actual incompleteness of the list because of the omission of essential particulars. The list is bad on its face, as bad in law as though there had been no entries at all in the "rateable value" column, and the assessment committee had explained their absence by saying that they had not had time to consider them and had therefore left them out. The excuse given in the present case for omitting these rateable values is no more valid than such an excuse would be, and in my opinion a valuation list which is defective in such respects is not an approved valuation list at all, because it is bad on the face of it. If we turn to the schedule to the Act and examine the form in which, as provided by s. 51, the valuation list is to be made out, we find that it contains, not only columns for the gross and rateable values as finally determined by the assessment committee, but also a note, which runs thus: "The two last of the above columns (for gross and rateable value as determined by the assessment committee) must be filled up, and the totals of those columns must be added up after the objections to the alterations have (if any) been heard, and before the list is finally approved." We find, moreover, that there has also to be a certificate given by

the members of the assessment committee of the union that, in determining the gross and rateable values of the above hereditaments, the provisions of the Valuation (Metropolis) Act, 1869, have been duly complied with. I cannot read those provisions without feeling that the statute intends, as one feels it should intend, that the insertion of the gross and rateable values of every hereditament is necessary before a list can be an approved valuation list within the meaning of the statute. It follows that the rating authority could have complained of this particular list as not being an approved valuation list; it had these important lacunæ, the filling up of which was essential to its statutory sufficiency as well as to its utility.

I am of opinion, therefore, that the Legislature has, as was to be expected, provided adequate machinery to enable the rating authority to prevent such a miscarriage in the making of a valuation list as has happened in the present case. That being so, the rating authority, having neglected to avail itself of that procedure, cannot apply for a mandamus to the assessment committee to correct its valuation list; its proper course was to enforce the correction, or perhaps I should rather say the due completion, of that list by means of the procedure provided by the statute.

I am further of opinion, with the learned president of this Court, that, even if I am wrong in supposing that the rating authority could by such procedure have obtained the correction or due completion of this valuation list, it is not in a position to obtain the mandamus asked for. The sole ground for the application is that the rating authority is interested in the proper performance of its statutory duty by the assessment committee. That, in itself, is an inadequate reason. It is altogether too broad a proposition to say that the mere fact of its being interested in the proper performance by the assessment committee of its duty justifies the granting of such a mandamus to the rating authority. Every ratepayer of every other parish is interested in the insertion of every hereditament in a parish and in the proper valuation by the assessment committee of the hereditaments which are inserted in the valuation list, but, as I read the Act, ratepayers of other parishes cannot individually complain of such matters, and certainly cannot obtain a mandamus

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such as is here applied for. The Legislature has drawn up a code of procedure, which was intended to be a practical code, for ensuring the substantial accuracy of a valuation list. The preparation of the list is hedged round by various safeguards, which allow persons directly and primarily interested to be heard during the period of its preparation; and when the Legislature has decided what are proper safeguards sufficient to ensure in practice a proper valuation list, it is not for us to add new safeguards. Even if I were satisfied that the Legislature did not intend the rating authority to have the wide powers of interference which I think it has given to it, I should feel bound to hold that it refused to do so because it thought it had given adequate protection in the formation of the list and that it was unnecessary to give these further powers to the rating authority, and that we were bound to accept that view. Whether or not I am right in thinking that the rating authority could interfere, I am satisfied, therefore, that we cannot, by exercising our power of granting a mandamus, insert in the Act further and different safeguards beyond those which the Legislature itself has inserted. In the enormous bulk of cases I have no doubt that the safeguards are even more than adequate.

To prevent any misunderstanding as to the meaning of my judgment, I wish to add that I do not in any way decide what is the effect of the insertion of rateable values in a valuation list. It has been argued by the appellants that it would be an injustice in their case to insert the rateable values of their properties, because the parishes in which they are situate would be obliged to pay an undue share of certain rates of which the proportion to be borne by each parish is determined by the total rateable value of all the hereditaments appearing in the list of that parish. It would no doubt seem to give rise to a case of hardship if this were so, because when the rate had been apportioned it would have to be borne by a portion only of those hereditaments. Whether that be so, or whether if it be so it is more than the statutes intended, I do not decide. It may be that in arriving at the totals for the purposes of such an apportionment the rateable values of such hereditaments only are to be considered as will have to bear the rate when apportioned. But all this must

depend on the statutes which regulate the liability to pay rates, and we are only dealing in the present case with the statute which regulates the making of the valuation list.

BUCKLEY L.J. I am of the same opinion. The case has seemed to me to be one of extreme difficulty, and I have felt great doubt as to the exact meaning and effect of the Act of Parliament upon which the question arises, but in the result I have come to the conclusion that the appeal should be allowed and that this mandamus ought not to go.

I express no opinion upon the question whether the rateable value of these exempted hereditaments ought to be inserted in the valuation list or not; it is unnecessary to decide it for the purpose of this appeal, and I desire to preserve an open mind upon it. On the one side I can see that if the rateable value of the exempted hereditaments is inserted in the list, thus increasing the total rateable value of the parish, it will, or at any rate may, upset the proper incidence of the poor rate as between this parish and other parishes. The primary object of the Acts of 1862 and 1869 was undoubtedly to assess for the purposes of the poor rate; but the Acts have been used for other purposes, and that has contributed largely to the creation of the difficulty. In order to arrive at the proper incidence of the poor rate, it seems to me that these amounts ought to be omitted from the column of rateable values, and therefore from the total. I do not agree that *Reg.* v. *Malden Overseers* (1) is an authority upon this question; in that case the hereditaments were rateable under certain circumstances, but being unoccupied, were not at the moment rateable; in the present case we are concerned with hereditaments which under no circumstances could be rateable, so far as the poor rate is concerned. It may be that, unless it is possible in some way under the Act of Parliament to insert two separate totals of rateable value, it would be unjust to insert the rateable value of these exempted hereditaments because their introduction would throw the poor rate wrong; but I confess that I cannot see anything in the Act of Parliament to justify the insertion of two totals. On the other hand, a formidable argument no doubt arises upon s. 45 and s. 51 of the Act

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of 1869, which, if valid, would go to shew that the rateable value of every hereditament rateable for any one of the several purposes mentioned in s. 45 ought to be inserted in the valuation list. As between those two arguments I desire to preserve an open mind until the question is ripe for decision.

For the purposes of my judgment I take the same course as was taken by Bray J. in the Divisional Court; that is to say, I will assume, without deciding the point, that the corrections in the valuation list for which the Corporation ask ought to be made. Upon that hypothesis it seems to me that the mandamus ought not to go, and that for two reasons. In the first place, I think that the Corporation had a right of appeal. My learned brethren have already discussed the bearing of s. 32, sub-s. 3, of the Act of 1869 upon this case. I will only say briefly that my view of that sub-section is that, if in a valuation list there has been what I assume to be an improper omission of the rateable values of a considerable number of the rateable hereditaments in the parish, the list would not be an approved valuation list; it would not be competent to the authorities to approve such a list. Sect. 51 and Sched. II. of the Act provide that the gross and rateable values shall be filled in and the totals added up; if the assessment committee ought to have done this and have not done it, they have not prepared a valuation list which it would be possible to approve. Under s. 32, sub-s. 3, there would be a right of appeal. There is also sub-s. 2, which is, I think, open to this comment, that, if the assessment committee has improperly omitted the rateable value of the exempted hereditaments, the total rateable value of the parish will be too low. Upon that hypothesis I think that the assessment committee has here gone wrong in a matter of principle; for they have, as a matter of principle, excluded a number of hereditaments which ought to have been included, with the result that the total is too low. I think it was open to the rating authority to appeal against the list on the ground that the total was too low because the figures had been omitted in the case of all the hereditaments described as being exempt. That is not, as was the case in *London County Council* v. *St. George's Union* (1), to quarrel with the gross or rateable

(1) [1894] A. C. 600.

value assigned to any specific hereditaments; it is finding fault with a matter of principle adopted by the assessment committee in the preparation of the valuation list.

The second reason for my opinion is this. Assuming that the rating authority had no right of appeal, still, looking at the Act of Parliament as a whole, I think that it provides an elaborate system of procedure under which the assessment committee is to prepare and arrive at a valuation list which, under s. 45, is to be conclusive. Numerous safeguards are provided by the Act with a view of ensuring the correctness of the valuation list, so far as human fallibility can make anything correct, and I think that the statute has given the rating authority certain powers of quarrelling with, or objecting to, that course of procedure, and this with the intention that they shall have no right to quarrel with, or object to, anything further—in other words, that, provided the requirements of the Act of Parliament are complied with, the rating authority shall no longer have it in its power to say that the assessment committee has gone wrong, even though it may have made mistakes; it must be taken to have been right, for the statute has made those mistakes impossible of correction. The result being that the thing is right, the rating authority cannot have a mandamus to compel the assessment committee to put right that which, upon that footing, already is right. Upon these grounds I agree that the order for a mandamus ought to be discharged.

Appeal allowed.

Solicitors for Associated Newspapers, Limited: *Francis Miller & Steele.*

Solicitors for overseers of Whitefriars: *Smith, Rundell & Dods.*

Solicitors for Metropolitan Asylums Board: *Williams & James.*

Solicitors for H. R. Banes & Co.: *Soames, Edwards & Jones.*

Solicitor for South Eastern and Chatham Railway Company: *J. W. Watkin.*

Solicitor for Conservators of the River Thames: *W. S. Bunting.*

Solicitor for Corporation of the City of London: *Sir Homewood Crawford.*

Solicitor for Assessment Committee: *E. V. Huxtable.*

W. J. B.

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1907

April 24;
June 5, 6, 19.

[IN THE COURT OF APPEAL.]

In re an Arbitration between COLEMAN'S DEPOSITORIES, LIMITED and THE LIFE AND HEALTH ASSURANCE ASSOCIATION.

Insurance, Accident—Policy—Condition in Policy—Immediate Notice of Accident—Omission to give Notice—Insurer's Liability.

A policy of insurance covering the liability of an employer to compensate his workmen for injuries by accident in the course of their employment was made subject to a condition that the employer should give immediate notice of any accident causing injury to a workman, and to a further condition that the observance and performance by the employer of the times and terms set out in the policy, so far as they contained anything to be done by the employer, were the essence of the contract.

On December 28, 1904, the employer signed a proposal form for the insurance and received a covering note, to which no conditions were attached. On January 3, 1905, the insurers sealed, and on January 9 delivered to the employer, the policy in question, which expressed that it was to be in force from January 1, 1905, to January 1 in the following year. On January 2, 1905, a workman in the employ of the assured was injured by an accident, which was believed to be slight, and of which notice was not given at the time to the insurers. Dangerous symptoms supervened, and the injured workman died on March 15; notice of the accident was given by the employer to the insurers on March 14, the day before the workman's death. The insurers repudiated all liability under the policy, on the ground (among others) that immediate notice of the accident was not given by the employer in accordance with the condition in the policy, and that the condition was a condition precedent to the right of the employer to recover. A claim for compensation by the widow was properly settled by the employer for a reasonable sum, and the claim of the latter against the insurers was referred to an arbitrator under the arbitration clause in the policy. The arbitrator held that the condition as to giving immediate notice of injury was a condition precedent, but stated his award in the form of a special case for the opinion of the Court, which reversed the arbitrator's decision. Upon appeal by the insurers:—

Held by Vaughan Williams L.J. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that, in the absence of evidence that the employer either knew of, or had the opportunity of knowing of, the existence of the condition at the date of the accident, the condition was one with which it was impossible to comply: that, as regards a risk which resulted in a claim before the insured had knowledge of the condition, the true inference was that the insurers never imposed the condition on the

employer, and that the latter was therefore entitled to recover on the policy.

Quære whether upon the construction of the policy as a whole, apart from the particular circumstances, the condition was a condition precedent.

APPEAL from a decision of Bray J., reversing an award of an arbitrator stated in the form of a special case.

The arbitration was held pursuant to an arbitration clause in a policy of insurance whereby the Life and Health Association undertook to indemnify Coleman's Depositories, Limited, against liability for injuries to their workmen under the Workmen's Compensation Acts, 1897 and 1900, the Employers' Liability Act, 1880, and at common law. The facts giving rise to the arbitration were as follows:—

On December 28, 1904, a representative of a firm of insurance brokers in Liverpool procured the signature of the employer to a form of proposal supplied by the association for insurance against the above risks; the proposal was then taken to the Liverpool agent of the association, who signed a form of receipt or covering note, the material part of which, so far as regards the present case, was, "Cover to hold good from this date"; the covering note contained no conditions. On January 3, 1905, a policy of assurance was signed and sealed by or on behalf of the association, and on January 9 or 10 it was handed by them to the insurance brokers and delivered by the latter to the employer. The policy expressed that it was to be in force from January 1, 1905, to January 1, 1906, and by it the association agreed to pay to or on behalf of the employer such sums as the employer should become liable to pay in respect of injury occasioned during the continuance of the policy to any workman whilst in his employment, under or by virtue of the Workmen's Compensation Acts, the Employers' Liability Act, or at common law. Clause 2 of the policy, so far as it is material to the present case, was as follows: "The employer shall give immediate notice to the association of any accident causing injury to a workman, and the employer shall also forward to the association every written, or information as to any verbal, notice of claim received within three days after the receipt of such notice, and shall give all information and

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assistance required by the association. . . . ." By clause 7, "The observance and performance by the employer of the times and terms above set out, so far as they contain anything to be done by the employer, are the essence of the contract."

On January 2, 1905, a workman named John Corrin, in the employ of the employer, received an injury by accident arising out of and in the course of his employment. The injury was not at first supposed to be serious, but he was eventually taken to a hospital, where he died on March 15. The only notice of the accident given by the employer to the association was a verbal notice on March 14, the day before the workman's death. Written notice of claim by the widow was received by the employer on March 27, but was not forwarded to the association; on March 29, however, the association were informed by a letter from the employer that the claim had been made. The association at once repudiated liability, and declined to take any part in, or give any instructions as to, the settlement of the claim. Proceedings under the Workmen's Compensation Act were taken by the widow and defendants against the employer, and were settled by the employer for 122*l.* and costs, which latter were ascertained at 12*l.* 17*s.*; the settlement was found by the arbitrator to be a reasonable and proper settlement. The addition of the employer's costs brought up the claim under the policy to a total of 162*l.* 12*s.* 4*d.*

The association having declined to pay that or any amount to the employer, the difference between them was, under the arbitration clause in the policy, referred to arbitration. At the hearing before the arbitrator it was admitted that Corrin's death was due to injuries by accident arising out of and in the course of his employment, and no question was raised as to the amount of the claim. But it was contended by the association that they were not liable to pay the claim on five grounds, of which the second was, "That the claimants had not given immediate notice to the association of the accident as required by clause 2 of the policy, and that the giving of such notice was by reason of clause 7 of the policy a condition precedent to the claimants' right to recover"; while the third ground was based on the fact that "the claimants did not forward to the association

the written notice of claim received by them within three days after the receipt thereof as required by clause 2, and that the forwarding of such notice of claim was by reason of clause 7 of the said policy a condition precedent to the claimants' right to recover."

The arbitrator found that grounds 2 and 3 afforded a good defence to the claim, but that the other three grounds did not. (1) He stated his award in the form of a special case, in which the question for the Court was "whether the claimants are disentitled by any of the said grounds of defence to succeed in their claim."

The special case was argued before Bray J., who held that neither the provision for giving immediate notice of an accident nor that for the forwarding by the employer to the association of a written claim was a condition precedent to the employer's right to recover on the policy, and gave judgment for the employer. The association appealed. The appeal was confined to the question whether the giving immediate notice of an accident was a condition precedent, the other point as to forwarding the written claim not being argued by counsel.

Tobin, K.C. (*G. D. Keogh* and *G. Washington Powers* with him), for the appellants. The decision of the arbitrator was right, and should be restored. The provision in clause 2 of the policy, that the employer is to give immediate notice of any accident causing injury to a workman, is a condition precedent to the employer's right to recover under the policy, and the association is entitled to rely on the defence that notice was not given by the employer in accordance with the terms of the policy. It is important to insurers that they should be able at once to institute inquiries into the history of an accident giving rise to a claim against them. An action by the insurers against the insured for damages for non-compliance with a condition as to giving immediate notice of the happening of an accident would be an illusory remedy, for it would be almost impossible to point to the specific damage resulting from the non-compliance. No

(1) It is unnecessary to set out these three grounds, which were not relied upon either in the Divisional Court or the Court of Appeal.

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doubt the expression "immediate notice" should be construed as meaning a notice which the arbitrator considers to be reasonably immediate having regard to the circumstances of the particular case. The appellants rely also on clause 7, which would be surplusage if the contention of the respondents were correct. The overwhelming balance of authority is in favour of the appellants. In *Worsley* v. *Wood* (1) a provision in a fire policy that the insured would forward to the insurers a certificate of the minister and churchwardens as to the character of the insured was held to be a condition precedent, although it was not so described in the policy, and although the certificate was in fact wrongfully withheld. In *Mason* v. *Harvey* (2) a provision that the insured would, within three months after a fire, deliver full particulars of loss was held to be a condition precedent; and similar provisions were held to be conditions precedent in *Roper* v. *Lendon* (3), *Cassel* v. *Lancashire and Yorkshire Accident Insurance Co.* (4), and *Williams and Thomas* v. *Lancashire and Yorkshire Accident Insurance Co.* (5), the facts in the last-mentioned case being practically identical with those of the present case. The only case to the contrary is *Stoneham* v. *Ocean, Railway and General Accident Insurance Co.* (6), where it was held that a provision that notice of a fatal accident should be given within seven days, which under the circumstances it was impossible to comply with, was not a condition precedent to the right of the assured to recover on the policy. The respondents cannot rely upon the covering note, which was not upon the face of it subject to any conditions, for they went to arbitration under the policy; they cannot claim under the policy and at the same time repudiate its conditions. Nor can they rely upon the contention that the policy was not delivered to them until seven days after the accident, for that point is not raised in the special case, and must therefore be taken to have been decided against the respondents by the arbitrator. In any event, it is plain that the respondents could have given notice of the accident within a reasonable time after receipt of the policy, which would have

(1) (1796) 6 T. R. 710.
(2) (1853) 8 Exch. 819.
(3) (1859) 1 E. & E. 825.
(4) (1885) 1 Times L. R. 495.
(5) (1902) 19 Times L. R. 82.
(6) (1887) 19 Q. B. D. 237.

been a substantial compliance with the requirement as to immediate notice.

Cuthbert-Smith, for the respondents. The provision for giving immediate notice of an accident was not a condition precedent to the right of the assured to recover. In the events which happened the condition was one with which it was impossible to comply, and the appellants cannot rely on the failure to give immediate notice as a defence to the claim. *Stoneham* v. *Ocean, Railway and General Accident Insurance Co.*(1) is a direct authority to that effect. When the parties intend that a provision in the policy is to be a condition precedent, they use apt language for that purpose; for instance, condition 4 provides that the name of every employee is to be entered each week in a proper wages book with the wage weekly paid, and that no claim is to be covered by the policy unless the name of the injured employee shall be so entered, unless he shall have been employed for less than a week at the time of the accident; and condition 6 says that it is expressly stipulated that the obtaining of an award of an arbitrator shall be a condition precedent to any right to recover by legal proceedings; in those cases the policy itself properly points out the risk which the assured runs by non-compliance with the condition. Further, even if the notice was a condition precedent under ordinary circumstances, its existence was not known to the respondents at the time of the accident, and compliance with it was impossible. The sole document which the respondents had then seen was the covering note, which was free from all conditions, and the onus of shewing knowledge on the part of the respondents of the conditions in the policy is upon the appellants, and they have not discharged that onus. The appellants must be taken to have waived performance of the condition so far as regards accidents happening before January 9, the date of the delivery of the policy to the employer.

[BUCKLEY L.J. The more correct view would seem to be that the condition was never imposed as regards this particular claim, as it was in the nature of things impossible to comply with it.]

Tobin, K.C., in reply.

Cur. adv. vult.

(1) 19 Q. B. D. 237.

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June 19. The following written judgments were delivered :—

VAUGHAN WILLIAMS L.J. In this judgment I shall call the insurance company the association and Messrs. Coleman the employer. Bray J. decides this case mainly on the ground that he cannot construe the word "essence" in clause 7 of the policy as being equivalent to condition precedent, and that it means only this—that it shall be the essence of the contract, that is to say, the employer shall be bound to do all those things within the time named or otherwise be liable for damages, if any have been incurred by the association. I do not differ from this conclusion of Bray J., although I have great doubt. I prefer to base my judgment also on the other points raised by Mr. Cuthbert-Smith, notwithstanding that Bray J. says that he should be slow to decide this case on those two points alone. The association, as Bray J. says, "here chose to act as all companies do; they agreed that the risk shall be covered as from a certain date, that is, the date of the receipt of that proposal. They chose to do it, and they do not send a copy of the policy; they do not say it shall be covered in accordance with or subject to the terms of the policy. They say it should be covered. How is the employer to know of these conditions unless they inform him?"

It appears from paragraph 3 of the award that the policy was executed by the association on January 3, 1905, but was not received by the brokers until about January 9 or 10, and that the brokers thereupon credited the association with the amount of the premium and debited them with the commission and delivered the policy to the employer. No point is made that the premium was not paid in accordance with the custom, so that the risk was accepted by the association and the employer covered as from December 28, 1904. On January 2, 1905, a workman in the employ of the employer, named John Corrin, received an injury by accident arising out of and in the course of his employment. The injuries of John Corrin were not in the first instance supposed to be serious, but at a later period his condition became serious, and he was taken to a hospital, where on March 15, 1905, he died. On March 27 a written notice of a claim by the widow of John Corrin on behalf of herself and her children was received by the employer from the solicitors acting for the said widow on

or about the date thereof, but the said notice was not forwarded to the association by the employer, who, however, on March 29, gave notice, without forwarding the claim received by them, by which they informed the association by letter of that date that such a claim had been made by solicitors acting for the widow. The association immediately repudiated liability and refused to have anything to do with the settlement of the claim or with the defence of the action. And thereupon the difference between the association and the employer went to arbitration in accordance with clause 6 of the policy. The arbitrator made his award, and on that award Bray J. gave judgment for the employer. No notice of the accident was given by the employer until March 14, 1905, the day before the death of the deceased, when verbal notice was given to the Liverpool representative of the association.

It is obvious on these facts that notice was not given as provided by clause 2 of the policy, for that clause says that the employer shall give immediate notice to the association of any accident causing injury to a workman, and the employer shall also forward to the association every written, or information as to any verbal, notice of claim received within three days after the receipt of such notice. It could not have been in the contemplation of the parties that this condition as to immediate notice should apply until the contents of the policy had been communicated to the employer. I hold that on the face of the award there is no evidence that the employer knew, or had the opportunity of knowing, the conditions of the policy, and that the onus is on the association; and in my opinion the risk undertaken by the association for the period prior to the delivery of the policy did not impose upon the employer the obligation to give immediate notice of the accident to Corrin on January 2, 1905, prior to the receipt by the employer of the policy or of information of its containing such a condition or obligation.

The only question in this case is the obligation of this condition as to immediate notice. As to the condition as to forwarding notice of claim received by the employer within three days of the receipt of such notice, I agree with Bray J. that there was no obligation to forward such notice after the association

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had repudiated. The result is that in my opinion this appeal should be dismissed with costs.

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FLETCHER MOULTON L.J. This is an appeal from a judgment of Bray J. upon an award stated in the form of a special case in respect of a claim made by the plaintiffs, Coleman's Depositories, Limited (whom I shall term the employer), against the Life and Health Insurance Association (whom I shall term the association) under a policy of insurance. This policy, which was issued by the association to the employer, covered the compensation which the employer might have to pay to his workmen for injury caused by accident when in his employ. The period during which the policy is expressed to be in force was from noon of January 1, 1905, until noon of January 1, 1906. By clause 6 of the policy any difference arising between the association and the employer under it is to be referred to arbitration, and it is expressly stipulated that the obtaining of an award by such arbitration shall be a condition precedent to any right to recover by legal proceedings. The award in question was by an arbitrator under this clause, and he finds that the workman of the employer received an injury from an accident occurring on January 2, 1905, while he was in his employ. The question for us to decide is whether, under the terms of the policy, the association are liable to indemnify the employer in respect of the compensation which he has properly paid to the representative of the workman, in accordance with the provisions of the Workmen's Compensation Act, 1897.

The association contend that the employer has failed to perform the obligations resting on him with regard to giving notice to the association of the accident, and that they are discharged from liability under the policy by reason of this default on his part. The only default relied upon for this purpose by the association on the hearing before us is based on the provision at the commencement of clause 2 of the policy, which reads as follows: "The employer shall give immediate notice to the association of any accident causing injury to workmen"; and they naturally and properly claim that we should read in connection therewith clause 7 of the policy, which is in the following terms: "The

observance and performance by the employer of the times and terms before set out, so far as they contain anything to be done by the employer, are the essence of the contract."

The facts of the case are as follows. An accident occurred on January 2, 1905, on the premises of the employer used by him for storing furniture, he being a furniture remover and warehouseman. The injuries to the workman were not in the first instance supposed to be serious, but they shewed themselves to be so later. No notice of the accident was, however, given by the employer to the association until March 14, which was the day before the workman died from the consequences of the accident. No reason is assigned for the omission on the part of the employer to give notice of the accident to the association, and it must be taken to have been deliberate and intentional on his part. Under these circumstances I confess that I am unable to come to any other conclusion than that the employer has wholly failed to fulfil the obligation to be performed by him, which was "of the essence of the contract." If the default had been a trifling one, that is to say, if some slight delay had taken place in giving the notice stipulated in the policy, different considerations might have arisen. The Courts have not always considered that they are bound to interpret provisions of this kind with unreasonable strictness, and although the word "immediate" is no doubt a strong epithet, I think that it might be fairly construed as meaning with all reasonable speed considering the circumstances of the case. But we have here a substantial and persistent breach of a provision obviously of great importance to the association, and which is by the terms of the policy itself declared to be of the essence of the contract, that is to say, to go to the root of it. Moreover, the condition interpreted in this way is a most reasonable one, and I can see nothing which ought to render the Court unwilling to enforce the full consequences of the breach. The association, who have to bear the pecuniary consequences of the accident, and who have stipulated that they should at once be informed of it, are entitled to have this obligation performed by the assured in order that they may be able to inquire into the circumstances of the accident while the matter is still fresh. In my opinion, both from the nature of

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the condition and from the express stipulation of the policy, the prompt giving of this notice is a fundamental condition of recovery under the policy, and if it be not given the employer is disentitled to claim the benefit of the indemnity in respect of the accident as to which he has failed to give notice.

The learned judge of the Court below, for whose opinion I have the deepest respect, would, I think, have come to the same conclusion had the words which I have extracted from the policy stood alone, but he has felt a difficulty in giving to clause 7 the effect which its words in my opinion require us to give it, because it is so general in its terms that it might be claimed to apply to the observance and performance by the employer of a large number of provisions, some of which are evidently of much less importance than others. He has therefore come to the conclusion that, because it would seem to render the contract unreasonable if clause 7 were taken literally, we must therefore give to it no effect at all. I cannot agree with this reasoning. In my opinion it is not open to the employer who is claiming under the policy to contend that the policy is unreasonable in its terms. He has accepted it, and he must be bound by its conditions. But if the Court should allow itself to be influenced by the comparative unimportance of some of the obligations that are put upon the employer, and should as a matter of construction see its way to limit the effect of clause 7 to those of the obligations of the employer which are of a more important character to the exclusion of minor matters, it ought not in my opinion to affect its judgment in the present case, because we have a practically total breach of the most important of the conditions of the policy. To hold that this does not free the association from liability would be to leave clause 7 out of the policy altogether, and also in my opinion to relieve the employer from the performance of what is by its nature (apart from the special conditions of clause 7) a condition precedent to his right to recover under the policy.

The respondents have contended before us that on the true interpretation of the policy the conditions expressed therein, of which the one in question is the most important, are not to be regarded as conditions precedent, because it is unlikely that the

parties would have intended to allow them to operate as a bar to recovery under the policy. But if we are to consider the question of probability at all, this is not a fair way of stating the question. The provisions in question must have some effect given to them, and if we were to allow ourselves to be guided by what it is probable that the parties intended, we should have to ask ourselves the question: "Is it more probable that the parties intended the default in giving notice to be a matter to be compensated in damages or to be a condition precedent to the claim?" If the question be asked in this form, it is in my opinion inconceivable that the parties could have intended that the default in giving notice should be a ground of cross-action for such damages as could be proved to have arisen from it. Every one would know that, although the notice would be of great importance to the association, it would be practically impossible to assign any specific damages to the breach of this obligation, however probable it might be that it had been productive of serious damage. From the nature, therefore, of the stipulation, as well as from the language of the contract, I am of opinion that its performance was a condition precedent to the right to recover, and not a ground of cross-action for breach.

I have now dealt with the only point which in my opinion this Court has before it. But during the hearing a further point was raised of a wholly different character, which I will now deal with out of respect to my brethren, who, I understand, consider the point to be one of substance and to be open to the respondents. This point is as follows. The policy was effected on December 28, 1904, through an agent of the association, who obtained the employer's signature to a form of application supplied by the association and gave to him a receipt or covering note, on which were the words "covered from date." This application form bears no date, but contains the words, "The liability of the association does not commence until this proposal has been accepted by the directors and the premium paid." The policy was actually sealed by the association on January 3, 1905, and it apparently reached the hands of the employer on or about the 9th or 10th day of that month. It is contended that under these circumstances there is a waiver by the association of all

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conditions which should have been performed by the employer prior to the day on which the actual document reached their hands. In my opinion no such point is open to the respondents The Court cannot travel outside the award, and no question of waiver is raised therein, nor is waiver one of the points of law which by his award the arbitrator says that he was requested to raise in his special case. These points of law are set out in extenso in paragraph 13 of the award, and they relate to entirely different matters.

Apart from the question whether the point is open to the respondents, I confess that I am wholly unable to follow the argument based on the facts to which they refer. The claim is not under any contract made by the covering note, but is a claim under the policy subsequently sealed. It is so expressed in the award, and indeed it was admitted that the arbitration took place by reason of its being such a claim. We have no information as to the reason why the actual document, which was sealed on January 3, did not reach the employer until about January 9 or 10. If the employer desired to insist on the policy corresponding with the covering note or starting from the date of sealing, they might perhaps have required that it should date from December 28, 1904, and expire on December 28, 1905, or from January 3, 1905, and expire on January 3, 1906, and might have refused to receive it if it was otherwise made out. But they did not do so, but chose to accept it in the form in which it stood, with its date and all its conditions, and they cannot be heard to object to any of them when they are making a claim under it. If any question of waiver by the association was to be raised they ought to have had notice of it in the arbitration. For all that we know the employer was aware of the sealing of the policy when it was effected, and certainly it is probable that he was fully aware of the conditions of the policy that he was effecting. But it is not permissible for us to speculate on these matters. If waiver were intended to be set up, it should have been raised before the arbitrator, and the association would then have had the opportunity of shewing that the circumstances were not such as to create any waiver. They would then, for instance, have been entitled to shew as a fact that the

employer was aware of the conditions as to notice under the policy that was to be granted to him, and that the leaving the policy in the hands of the association was a voluntary act on his part. It is immaterial whether or not the association would have succeeded in doing so. It is not for the Court to make hypotheses as to circumstances such as these. Waiver must depend on the intention of the parties, and the circumstances which shew that intention must be found by the arbitrator, if they are to be acted on by the Court. Moreover, I see nothing to prevent an adequate performance of the conditions precedent at the date when, so far as the Court is aware, the policy might have been obtained by the employer if he had chosen to ask for it.

For these reasons I am of opinion that the point of waiver is not before us, and that, even if it were before us, there are no findings by the arbitrator which would justify us in deciding in favour of the respondents upon it. But I must add that the fact that no such point was made before the arbitrator, and no relevant facts were found by him in his award, is not my only objection to this contention of the respondents. The doctrine that there is some duty on the part of the assurers to get the policy into the physical possession of the assured, and that the rights of the parties under the policy depend on the date at which this is effected, is to me so bewildering, and so foreign to any principles of law applicable to written contracts, and so unlike anything to be found in previous decisions as to the liabilities of parties under contracts such as these, that I am unable to follow it. I fear, therefore, that I am not doing justice to a point which commends itself to my brethren, and therefore I shall say no more on the point of law.

BUCKLEY L.J. For the purposes of the decision of this case the material facts taken from the award are as follows. On December 28, 1904, the employers signed the proposal, and by the hands of Moran, Galloway & Co. as their agents received the covering note from the insurance company. The premium was duly paid, not, it is true, at that time, but at a later date. The award, however, finds as a fact that as between the insurance

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company and the assured the premium is to be treated as having been paid. On January 2, 1905, a risk covered by the proposal and covering note resulted in a claim. At that date the assured had no knowledge of the condition now relied upon. The absence of such knowledge is not stated in the award, but knowledge (if it existed) was a fact for the insurance company to prove, and they have not proved it. On January 9 or 10 the policy was received by Moran, Galloway & Co., and delivered by them to the employer. The policy contained a condition that "the employer shall give immediate notice to the association of any accident." The whole matter for decision before us is whether the failure of the employer to comply with that condition affords a good defence to this particular claim. In my opinion it does not.

On January 2 the employer had no knowledge of the condition which was subsequently disclosed by the policy. It was impossible, therefore, that he should comply with a condition which required that he should give immediate notice to the association of the accident which occurred on January 2, for he had at that time no knowledge that it was required of him. The policy when delivered was dated January 3, and was to be in force from January 1, 1905. But upon these facts the true inference in my opinion is that the insurance office, as regards this risk which had resulted in a claim before knowledge of the condition was created, never imposed that condition. The point is not that there was waiver of a condition which was applicable to this risk. It is that the condition never became applicable to this risk. Upon this ground I think that the appeal fails.

Under these circumstances it is not necessary to decide the point upon which Bray J. gave judgment, but I am far from saying that in my opinion the true construction of the policy is not that which he put upon it. The question is one of construction, and upon such a question authorities are of little or no value. Authorities may determine principles of construction, but a decision upon one form of words is no authority upon the construction of another form of words. As regards this instrument, the relevant matters are as follows. The stipulation of clause 2 that the employer shall give immediate notice might in

the absence of further provision be directory only, or might be essential. The purpose of clause 7 may be simply to provide that it shall not be directory, but shall be essential. That, however, leaves open the question whether the remedy for non-observance of this essential provision is by way of damages or whether the condition is a condition precedent. This policy twice uses the expression "condition precedent," viz., first in the recitals, and secondly in clause 6, and does not use those words in the particular clause, 7, which is under discussion. Moreover, clause 7 provides by general words that matters of detail such as that the employer "shall give all information and assistance required," which it is difficult to believe are intended to be conditions precedent, shall be essential. And the policy further in clauses 3 and 4 twice provides that "the employer shall not be entitled to recover," or that "no claim shall be covered by this policy," in certain events. But it contains no similar language as regards non-observance of the requirement to give immediate notice. If, therefore, it were, which I think it is not, for the purpose of this decision necessary to construe the policy and determine whether this condition is a condition precedent or not, I should not be disposed to differ from the conclusion at which Bray J. arrived. I think the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellants: *W. G. Duke, for J. Leo Gribbin, Liverpool.*

Solicitors for respondents: *Field, Roscoe & Co., for Rutherfords, Liverpool.*

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ASSICURAZIONI GENERALI DE TRIESTE *v.* EMPRESS ASSURANCE CORPORATION, LIMITED.

Insurance (Marine)—Reinsurance—Fraudulent Misrepresentation of Official employed by Shipowners—Recovery by Insurers of Damages from Shipowners—Subrogation.

The plaintiffs gave the defendants an open cover slip by which they undertook to reinsure the defendants to the extent of one-half their interest up to 1000*l.* on certain shipments of lumber. Pursuant to the cover slip, the plaintiffs reinsured the defendants by two policies respectively on interests by two vessels. Under the policies the defendants claimed and were paid by the plaintiffs sums amounting to 1354*l.* 4*s.* 10*d.* The defendants subsequently recovered from the shipowners damages by reason of having been induced to pay losses on the two vessels by fraudulent misrepresentations of an official in their employment. The measure of the damages so recovered by the defendants was the sum which upon inquiry appeared to flow from the liability of the defendants as insurers in respect of the two vessels, and included the 1354*l.* 4*s.* 10*d.* The plaintiffs then sued the defendants for the repayment of the 1354*l.* 4*s.* 10*d.* as money received by them to the use of the plaintiffs:—

Held, (1.) that the plaintiffs were entitled, upon the principles laid down by Brett L.J. and Bowen L.J. in *Castellain* v. *Preston*, (1883) 11 Q. B. D. 380, to recover the 1354*l.* 4*s.* 10*d.* upon the ground that the money was obtained by the defendants by enforcing a right which diminished the defendants' loss, and that therefore the doctrine of subrogation applied; (2.) that the defendants were entitled to deduct from the 1354*l.* 4*s.* 10*d.* the reasonable expenses of recovering that sum from the owners.

Hatch, Mansfield & Co. v. *Weingott*, (1906) 22 Times L. R. 366, followed.

Action tried in the Commercial Court before Pickford J. without a jury. The following statement of facts is taken, in substance, from the judgment of Pickford J.

The action was brought to recover the sum of 1354*l.* 4*s.* 10*d.* as money received by the defendants to the use of the plaintiffs. The claim arose out of an open cover slip by which plaintiffs reinsured the defendants to the extent of one-half their interest up to 1000*l.* on certain shipments of lumber, and under this slip the plaintiffs reinsured the defendants by two policies of insurance, one for 635*l.* in respect of a vessel called the *Riverside* and the other for 1000*l.* in respect of the *Zebina Goudey*.

The defendants had given an open cover to Messrs. C. T. Bowring & Co. under which the latter could declare interests by a number of vessels, but were not at liberty to declare interests by vessels belonging to a firm of Martin Taylor & Co.

The *Riverside* and *Zebina Goudey* did belong to that firm, and were put forward by Messrs. C. T. Bowring & Co. and accepted by the defendants without the knowledge of the latter that they were what were referred to at the trial as "Martin Taylor boats," *i.e.*, boats belonging to Martin Taylor & Co., and the losses were settled by the defendants without that knowledge. The defendants then claimed, and were paid by the plaintiffs, the sum of 1354*l.* 4*s.* 10*d.* under the policies mentioned above.

Subsequently, on February 1, 1901, the defendants brought an action against Messrs. C. T. Bowring & Co. claiming relief on various grounds, and at the time of bringing the action nothing was known about any claim to relief in respect of losses paid on the *Riverside* and *Zebina Goudey*.

In the course of discovery and investigation in that action the facts about these two vessels came to light, and on January 22, 1904, the claim in the defendants' action was amended by claiming damages by reason of the defendants having been induced to pay losses on these two vessels and another, called the *Curlew*, by fraudulent representations of Messrs. C. T. Bowring & Co. or someone in their employment, in addition to other relief previously claimed.

The action was tried before Kennedy L.J., then J., and he gave judgment in favour of the present defendants in respect of the *Riverside* and *Zebina Goudey* upon the ground that, although there was no evidence whatever that any member of the firm of C. T. Bowring & Co. personally had any part in the matter or was cognisant of it, there had been active misrepresentations and declarations not in accordance with honesty or good faith made by an official in the insurance department of C. T. Bowring & Co. for which the firm was responsible, but he held that their action failed in respect of the *Curlew*, and also in respect of all the other relief claimed. His judgment, so far as material for the purpose of this report, was in these words: "I must declare, therefore, taking the view which I have expressed, that the plaintiffs"—that is, the defendants in this action—"are entitled in respect of the *Zebina Goudey* and the *Riverside* to such damages as may, unless they are agreed, upon inquiry

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appear to flow from the liability of the plaintiffs as insurers in respect of these two risks." He also gave to the present defendants the costs of the action in respect of this relief, but gave to Messrs. C. T. Bowring & Co. the costs of the issues on which they succeeded, which far exceeded the costs payable to the defendants.

An agreement was afterwards made by which the defendants and Messrs. C. T. Bowring & Co. settled the amount payable to one another, and it must be taken that the defendants received the costs to which they were entitled on taxation between party and party in respect of their claim against Messrs. C. T. Bowring & Co. The defendants' solicitor, however, had a large claim against the defendants for costs in the action as between solicitor and client, and these were settled for a sum of 14,000*l.*

The plaintiffs now claimed to be repaid the sum of 1354*l.* 4*s.* 10*d.* paid by them to the defendants upon the reinsurance of shipments on the *Riverside* and *Zebina Goudey*, and the defendants resisted the claim on two grounds: (1.) that the moneys so received from Messrs. C. T. Bowring & Co. were not received to the use of the plaintiffs, and that there was no right of subrogation of which the plaintiffs could avail themselves; and (2.) that if they were liable for any amount they were only liable for such an amount as remained after deducting the costs of recovering that sum, and they claimed that, as the action against Messrs. C. T. Bowring & Co. was the means of recovering the sum, and the facts upon which they succeeded in doing so were only discovered by means of discovery and investigation in that action, they were entitled to deduct the whole or the greater part of the costs which they had to pay to their solicitors in respect of it. If they were right in this contention there would be no balance left to which the plaintiffs would be entitled.

Scrutton, K.C., and *Leck*, for the plaintiffs. The defendants by recovering from the Empress Assurance Company have diminished their loss. It is clear from the judgment of Lord Esher M.R. in *Castellain* v. *Preston* (1) that the plaintiffs are entitled to be subrogated to the defendants' rights to the extent

(1) 11 Q. B. D. 380.

to which the defendants have so diminished their loss: *Burnand* v. *Rodocanachi*. (1)

J. A. Hamilton, K.C., and *Maurice Hill*, for the defendants. The questions are—(1.) Can the plaintiffs recover anything? (2.) If so, how much? Those are questions of law, novelty, and importance. The defendants recovered from C. T. Bowring & Co. in respect of a cause of action personal to themselves arising out of a fraud not authorized by C. T. Bowring & Co. One of their officials, for whose acts they were found responsible, was guilty of fraudulent misrepresentation. That was a personal tort not connected with the subject matter of the insurance. It is similar to a libel published incidentally in the course of an insurance transaction. There is no authority upon the subject of subrogation which covers the present case. The fact that a reassured has in fact been paid twice over is not contrary to good conscience or good law: *Burnand* v. *Rodocanachi*. (1)

It is true that there are expressions in the judgment of Brett L.J. in *Castellain* v. *Preston* (2) which are wide enough to cover the present case. But there is no decision by which the right of subrogation has been extended to a matter which is not incident to the subject of insurance itself. For example, in *Darrell* v. *Tibbitts* (3) the injury had been to the subject-matter of the insurance. The judgment of Cotton L.J. in *Castellain* v. *Preston* (2) shews that it was present to the mind of the Court that it by no means follows that the assured would have to give credit for damages recovered by him in every action of tort he could bring or to treat them as salvage. In the present case the action was not brought in respect of the subject-matter insured in any way. The damages were recovered from C. T. Bowring & Co. by way of personal compensation for a personal outrage. Just as the judgment in *Burnand* v. *Rodocanachi* (1) gave a personal solatium for a wrong done on the high seas, so the judgment of Kennedy J. was that the defendants were entitled to a personal solatium for a personal wrong.

As to the quantum recoverable by the plaintiffs, they can only recover the net amount of the salvage. If the defendants had

(1) (1882) 7 App. Cas. 333. (2) 11 Q. B. D. 380.
(3) (1880) 5 Q. B. D. 560.

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not begun and prosecuted the action as they did against C. T. Bowring & Co., they would not have discovered the facts which constituted the fraud in respect of the *Riverside* and *Zebina Goudey*. It is impossible to dissever the costs of the issues on which the defendants failed in that action from the costs of the issues on which they succeeded. It is impossible to say that the costs they in fact incurred were not connected with the recovery of the damages. The decision in *Hatch, Mansfield & Co.* v. *Weingott* (1) shews that the plaintiffs cannot compel the defendants to hand over all the money they have recovered from C. T. Bowring & Co. and at the same time to say to them that they must consider the costs the law allows as compensation for the outlay they have incurred. Those costs in fact did not nearly compensate the defendants for their outlay.

With regard to the *Curlew*, the defendants failed to recover from C. T. Bowring & Co. because they failed to prove the fraud of the official, but a reinsurer cannot claim money from the reinsured without paying him the costs he has been put to in recovering it from the wrong-doer. It was in consequence of the action having been brought by the defendants against C. T. Bowring & Co. that discovery was obtained, and it was because discovery was obtained in that action that the fraud with regard to the *Riverside* and *Zebina Goudey* was discovered, and the defendants recovered from C. T. Bowring & Co. in respect of those ships. The expense to which the defendants were in fact put in that action ought to be considered as a salvage effort. [*West of England Fire Insurance Co.* v. *Isaacs* (2), *Phœnix Assurance Co.* v. *Spooner* (3), and s. 79 of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), were also referred to.]

Scrutton, K.C., in reply. The subject matter of the reinsurance was the liability of the original insurer to pay if there was a loss. The plaintiffs were induced to undertake the reinsurance by means of the fraud. In *Castellain* v. *Preston* (4) it is laid down that subrogation is equivalent to indemnity. *Stearns* v. *Village Main Reef Gold Mining Co.* (5) is in the plaintiffs' favour. The

(1) 22 Times L. R. 366.
(2) [1897] 1 Q. B. 226.
(3) [1905] 2 K. B. 753.
(4) 11 Q. B. D. 380.
(5) (1905) 10 Com. Cas. 89.

defendants are only entitled to take credit for the amount of the costs as if there had been a taxation, but in any event they cannot be entitled to more than such costs, in addition to the taxed costs, as were reasonably and properly incurred: Order 65, r. 27 (29).

Cur. adv. vult.

July 16. The following judgment was read by

PICKFORD J., who, after stating the facts, continued: The plaintiffs contend that, as this money was obtained by enforcing a right which diminished the defendants' loss, it was received to the use of the plaintiffs as reinsurers, and they rely upon the judgments of Brett L.J. and Bowen L.J. in *Castellain* v. *Preston*. (1) The defendants contend that these judgments do not apply to this case, as they say that this was money received in respect of a personal tort committed by a person other than the original assured, and was not received in diminution of their loss; and Mr. Hamilton, on behalf of the defendants, compared this case to that of an action for libel published incidentally in, and arising out of, the insurance transaction. The defendants also contended that the passages to which I have referred were dicta merely, and not necessary for the decision of the case then under consideration. The passages were these: Brett L.J. said: "In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be placed in the position of the assured. Now it seems to me that, in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that, as between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured

(1) 11 Q. B. D. 380.

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by the exercise or acquiring of which right or condition the loss against which the assured is insured can be, or has been, diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated." Bowen L.J. said: "And subrogation is itself only the particular application of the principle of indemnity to a special subject-matter, and there, I think, is where the learned judge has gone wrong. He has taken the term 'subrogation,' and has applied it as if it were a hard and fast line, instead of seeing that it is part of the law of indemnity. If there are means of diminishing the loss, the insurer may pursue them, whether he is asking for contracts to be carried out in the name of the assured, or whether he is suing for tort. It is said that the law only gives the underwriters the right to stand in the assured's shoes as to rights which arise out of, or in consequence of, the loss. I venture to think there is absolutely no authority for that proposition. The true test is, Can the right to be insisted on be deemed to be one the enforcement of which will diminish the loss?"

I think on the first point the plaintiffs are right. I am by no means sure the passages are only dicta. I think the learned judges were stating the principle on which their decision proceeded, but in any case they are dicta of such authority that I think I am bound to follow them, and that they cover this case. I think that the money was received in diminution of the loss, and that the case of a libel as suggested is not analogous. The claim was to recover the amount of damage which the defendants had suffered by reason of having to pay the loss, and the amount of the loss was the measure of the damages which the defendants recovered, as is shown by the passage of the judgment of Kennedy L.J. which I have read. In the case of a libel the amount of the loss would have no bearing whatsoever upon the damages which would be recovered in respect of an injury to the defendants' reputation.

I think therefore that this money was received by reason of the enforcement of a right which diminished the defendants'

loss, and therefore is within the judgments I have mentioned and covered by their authority.

With regard to the second point, the plaintiffs contended that the expenses were limited to the amount of costs payable to the defendants between party and party, as they said that that amount must be looked on in law as the costs properly incurred by the defendants in respect of the action. If this be right, the defendants have received these costs, and cannot deduct any further expenses.

But I think this point is covered by the authority of the decision of Jelf J. in *Hatch, Mansfield & Co.* v. *Weingott* (1), and that the plaintiffs are wrong.

It is true that in that case the taxed costs were those of a criminal prosecution, and not those taxed between party and party in a civil action, but I think the principle is the same.

The costs taxed in a criminal prosecution as payable by the county are those which are considered as the costs properly payable as the costs of the prosecution in any particular case, and anything beyond them is looked upon as equally a luxury, to use the expression quoted in the Annual Practice, 1907, p. 951, from *Smith* v. *Buller* (2), as the costs of an action beyond those allowed between party and party.

I think therefore that the defendants are entitled to deduct whatever are the reasonable expenses of recovering the sum obtained from Messrs. C. T. Bowring & Co.

But I am quite unable to say that all the costs of that action are properly to be deducted. I do not know enough of that action to say that, and I think it very improbable, and I cannot accept Mr. Hamilton's contention on behalf of the defendants that they are entitled to deduct necessarily either all the costs which were in fact incurred in investigating Messrs. C. T. Bowring's business up to the time when the facts which led the judge to find that this fraud was established were discovered, or all the costs incurred in respect of issues in the action in which the plaintiffs were interested if the defendants succeeded in them.

I do not see how I can, in my present state of information, lay

(1) 22 Times L. R. 366. (2) (1875) L. R. 19 Eq. 473.

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down any principle to guide the inquiry except what I have already said, i.e., that the defendants are entitled to deduct whatever may on investigation of the circumstances of that action be found to be reasonably and properly attributable to the recovery of this money, and that that cannot be determined without knowledge of all those circumstances of which I am quite ignorant. There must therefore be a declaration that the 1354*l.* 4*s.* 10*d.* is money received by the defendants to the use of the plaintiffs, and that the defendants are entitled to deduct the costs reasonably and properly incurred in enforcing their claim to that sum against Messrs. C. T. Bowring & Co.

Declaration accordingly.

Solicitors for plaintiffs: *Ballantyne, McNair & Clifford.*
Solicitors for defendants: *Davidson & Morriss.*

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[IN THE COURT OF APPEAL.]

ADAMS *v.* MARYLEBONE BOROUGH COUNCIL.

London—Party Wall—Settlement of Difference between Building and Adjoining Owners—Compensation for Damage to Trade—Jurisdiction of Surveyors—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 88, *sub-s.* 6, *s.* 91.

Where a difference has arisen between a building owner and an adjoining owner under s. 90 of the London Building Act, 1894, with respect to the raising of a party wall under s. 88, sub-s. 6, of that Act, the surveyors appointed under s. 91 of the Act to settle that difference have no jurisdiction to entertain a claim for compensation by the adjoining owner against the building owner for damage caused to the trade of the former through the exercise by the latter of the rights given to him by the before-mentioned sub-section.

APPEAL from the judgment of a Divisional Court (Ridley and Darling JJ.) dismissing an appeal from the Marylebone County Court, reported [1906] 2 K. B. 767.

The appellant, Maria Adams, was the sub-lessee and occupier of a house, No. 33, John Street, Edgware Road, where she carried on the business of a restaurant keeper, and the respondents, the

Marylebone Borough Council, were the owners of the adjoining premises, No. 34. The premises of the appellant and those of the respondents were divided by a party wall common to both sets of premises. In 1904 the respondents commenced to raise the party wall and to build upon it without having given any building owner's party-wall notice to the adjoining owners, as required by the London Building Act, 1894. They contended that they were entitled to do this under an award made by surveyors, who had some time before, when the party wall was rebuilt by a person who was then tenant of No. 33, acted as arbitrators between that person as building owner and the respondents as adjoining owners under the London Building Act, 1894, that award having (inter alia) awarded that the respondents were to have the right at any time to raise the party wall as they might desire. (1) Actions were thereupon brought by the owners of No. 33 and the appellant respectively against the respondents, claiming an injunction to restrain them from trespassing on, or interfering with, the party wall without first serving a building owner's notice on the owners of the adjoining premises and proceeding under the London Building Act, 1894. Phillimore J. granted interlocutory injunctions at chambers; and, the respondents appealing against his order, it was agreed that the hearing of the appeal should be treated as the trial of the actions. The Court of Appeal dismissed the appeal, holding that the award relied upon by the respondents was ultra vires so far as it reserved to them liberty to raise the wall, and gave judgment in the actions for an injunction as claimed, with liberty to the plaintiffs to apply in respect of damages, if any. (1) The respondents on August 11, 1904, served a building owner's party-wall notice under s. 89 of the London Building Act, 1894, upon the freeholders and the lessee, and the appellant as sub-lessee of No. 33, stating their intention to raise the wall to a certain height, and to do other work thereon as specified in the notice. The adjoining owners did not consent to the execution of the works mentioned in the notice, and thereupon a difference arose between the parties under the London Building Act, 1894, s. 90, sub-s. 7. Surveyors were then appointed under s. 91

1) See the facts as stated in [1904] 2 K. B. 893, and [1905] 1 K. B. 661.

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of the Act to whom this difference was referred. Subsequently an order was made in the action brought by the appellant against the respondents as above mentioned for an inquiry before an official referee as to damages caused by the operations of the respondents prior to the giving by them of the party-wall notice, and 64*l.* damages had been awarded by him to the appellant. It was stated in argument that there had been an understanding between the parties that, when the party-wall notice was given, quoad the future the previous operations of the respondents in respect of the party wall should be taken to have been carried on under the London Building Act, 1894. It appeared that no further operations had since the giving of the notice been carried on by the respondents with respect to the party wall, pending the arbitration, but it was alleged by the appellant that further damage to her business had since the giving of the notice been occasioned by the continuance of the state of things which had been brought into existence by the prior operations of the respondents. In the arbitration before the surveyors under the Act they by their award ordered the respondents to carry up the appellant's flues, and to do certain work for her benefit, and to make good structural damage to her premises, but they refused to entertain a claim made by her for compensation for damage temporarily caused to her in her trade as a restaurant keeper by the execution of the work.

From their award she appealed to the county court, but the county court judge held that the surveyors had no jurisdiction under s. 91 of the Act to award such consequential damages, and dismissed the appeal.

On appeal the Divisional Court affirmed the decision of the county court judge.

A. H. Poyser, *Koppel* with him, for the appellant. The surveyors appointed as arbitrators under the London Building Act, 1894, were wrong in refusing to entertain the claim put forward by the appellant for compensation in respect of damage done to her business. It was held by Jessel M.R., in *Standard Bank of British South America* v. *Stokes* (1), that, whatever the rights of

(1) (1878) 9 Ch. D 68, at p. 73.

adjoining owners as tenants in common of a party wall might have been at common law, according to the true construction of the Metropolitan Building Act, 1855, they no longer existed in cases within the Act, and in such cases their rights depended on the Act. The same rule would apply to the London Building Act, 1894, Part VIII. (ss. 87—101) of which provides as to the rights of building and adjoining owners with regard to a party structure, which by s. 5, sub-s. 20, includes a "party wall." Sect. 88, sub-s. 6, gives a right to a building owner to raise a "party structure" upon condition of making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof, and of carrying up to the requisite height all flues and chimney stacks belonging to the adjoining owner on or against such party structure. It does not follow, because those liabilities are imposed on the building owner in that sub-section as a condition of his right to do the work, that he is under no liability in other respects under other sections of the Act for damage occasioned by the work to the adjoining owner. Sect. 90 lays down rules as to the exercise of their rights by building and adjoining owners, and by sub-s. 3 of that section it is provided that "a building owner shall not exercise any right by this Act given to him in such manner or at such time as to cause unnecessary inconvenience to the adjoining owner or to the adjoining occupier." Under sub-s. 7 of the same section, if the adjoining owner does not within fourteen days express his consent to the notice given him by the building owner, he is to be considered as having dissented therefrom, and thereupon a difference shall be deemed to have arisen between the building owner and the adjoining owner. Then s. 91, sub-s. 1, provides for the appointment of surveyors who are to "settle any matter from time to time during the continuance of any work to which the notice relates in dispute between such building and adjoining owner," with power by their award "to determine the right to do, and the time and manner of doing, any work, and generally any other matter arising out of or incidental to such difference." It is submitted that the intention was that under that sub-section the arbitrators should have power to entertain any claim for compensation in respect of the work having been done so as to

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occasion unnecessary inconvenience to the adjoining owner, that being a matter in dispute between the parties.

[FLETCHER MOULTON L.J. The claim of the appellant before the arbitrators does not seem to have been directed to "unnecessary" inconvenience.

VAUGHAN WILLIAMS L.J. It would appear from the county court judge's note that the claim was made in respect of damage to the appellant's business occasioned by the building owners' exercise of their powers under s. 88, sub-s. 6. Assuming for the sake of argument that the arbitrators would have jurisdiction to entertain a claim for damage to business against the building owner on the ground that he went beyond his powers by negligently exercising them so as to cause unnecessary inconvenience, there does not seem to have been any suggestion of such a claim.]

The claim was no doubt in a somewhat general form for damages to business, but the arbitrators refused to go into any question but that of structural damage. They declined to hear evidence as to any trade damage, however occasioned. They should have heard the evidence, and then should have determined according to it.

[FLETCHER MOULTON L.J. The general principle applicable in such cases is that "compensation" as distinguished from "damages," properly so called, is only for acts done within the statutory powers, which, if not authorized by the Act, would have been actionable.]

It is submitted that the intention under the London Building Act, 1894, was that all questions between the building and adjoining owners should be determined in an expeditious inexpensive way by the surveyors from time to time during the continuance of the work. [He cited *In re Stone and Hastie.* (1)]

G. A. Scott, Rittner with him, for the respondents. The appellant recovered damages in her action in respect of the period before the building owners' party-wall notice was given, during which the respondents were trespassers, which damages included damage to the appellant's business. It was agreed that the respondents should legalize their position by giving the

(1) [1903] 2 K. B. 463.

requisite notice, and then, quoad the future, the work should be treated as having been done under that notice. Since that notice nothing further has been done, the work being at a standstill pending the conclusion of the arbitration. It is submitted that s. 88, sub-s. 6, of the London Building Act, 1894, entitles the building owner to raise the party wall, which, as a tenant in common of it, he would have been entitled at common law to do, imposing upon him, however, certain statutory conditions as to making good structural damage to the adjoining premises, but the Act nowhere provides that any compensation is to be paid by him for any damage caused by the mere exercise of his rights under the Act. Negligence in the course of the exercise of the statutory right would be a matter outside the Act, and therefore could not come within the jurisdiction of the statutory tribunal provided for by s. 91, which has to deal only with differences between the parties arising under the Act. Sect. 91 of the Act is not a section conferring rights; it merely provides a machinery for settling differences as to the rights of the parties under the Act, and matters arising out of or incidental to such differences. It cannot be read as impliedly conferring a right to claim compensation for damage caused by the exercise of the powers given by the Act. [He cited *Cubitt* v. *Porter* (1), and *Bradbee* v. *Christ's Hospital*. (2)]

A. H. Poyser, for the appellant, in reply. The continuance of the state of things brought about by the acts of the respondents, before they put themselves right by giving the building owners' party-wall notice, has occasioned fresh damage to the appellant's business since the notice was given.

VAUGHAN WILLIAMS L.J. This case does not come before us in a very satisfactory way, and the facts are not very clear. It is complained that the arbitrators refused to hear evidence of matters by reason of which the appellant, who occupied premises adjoining the wall in question, where she carried on the business of a restaurant keeper, alleged that she had suffered damage, for which she claimed to be entitled to compensation under the London Building Act, 1894. There was no formal claim, but the appellant

(1) (1828) 8 B. & C. 257. (2) (1842) 4 M. & G. 714.

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appeared before the arbitrators and said that she was prepared to tender evidence, which they refused to hear. What the nature of the evidence was which the appellant tendered, and which the arbitrators refused to receive, I do not even now very clearly know. I do not even know what exactly was the nature of the claim for compensation set up before the arbitrators. It appears that in the first instance, when the respondents commenced operations upon this wall, they supposed themselves to be entitled to do so without giving any notice to the adjoining owner, as required by the London Building Act, 1894. They were wrong as to that, and the result was that actions were brought against them by the owners of the adjoining premises and the appellant, which succeeded, and an injunction was granted to restrain them from interfering with the party wall without giving a notice under the London Building Act, 1894; and damages were afterwards assessed in respect of any loss sustained by the appellant up to that time at the amount of 64*l*. I do not exactly know what may have been the subject-matter in respect of which those damages were assessed, but I gather that, amongst other things, they covered the loss of lodgers and a certain amount of loss of trade sustained by the appellant up to that date. However that may have been, damages were given in respect of the injury sustained by the appellant by reason of the trespass complained of in that action. The parties on both sides appear to have recognized that under those circumstances notice would have to be given by the respondents in conformity with the Act before they could proceed with their operations, and such a notice was accordingly given by them. As far as I can make out, from the time when that notice was given up to the present time the respondents have not done any work at all, but have simply left things where they were before the notice was given. As I understand—though the effect of what took place is not altogether clear—it was agreed between the parties that the notice should be given nunc pro tunc, and that the work already done should thenceforward be treated as if it had been done under a notice duly given under the Act. In these circumstances it is suggested that some further damage has since been caused to the

appellant by the work already done. With regard to that we are in very considerable difficulty from not knowing exactly what the nature of the damage in respect of which the appellant claimed was, for it may very well be, so far as appears, that it was damage sustained by the appellant merely by reason of the exercise by the respondents of their rights under the London Building Act, 1894, s. 88. I can only say, if that was so, that, in my opinion, such damages not only cannot be claimed before the tribunal of arbitrators constituted under s. 91 of the Act, but cannot be claimed before any tribunal whatever. One knows that sometimes an Act of Parliament authorizes the doing of acts which, if done without such authority, would constitute trespasses, as in the case of railway Acts and other Acts giving compulsory powers to take land, and that under such Acts compensation is given in lieu of damages which might have been recovered, if such acts had been done without statutory authority. But, in my opinion, the mere exercise of the rights which under the London Building Act, 1894, are substituted for the rights which formerly existed at common law as between the tenants in common of a party wall cannot in itself give any right to compensation, because it is in its nature rightful.

That being so, I proceed to examine the Act of 1894, in order to see whether any, and, if so, what rights to compensation are given under it, and before what tribunal those rights are enforceable. Sect. 88 of the Act deals generally with the rights of the building owner in relation to party structures. Sub-s. 1 of that section provides that he shall have "a right to make good, underpin, or repair any party structure which is defective or out of repair"; sub-s. 2 gives him "a right to pull down and rebuild any party structure which is so far defective or out of repair as to make it necessary or desirable to pull it down"; sub-s. 3 gives him "a right to pull down any timber or other partition which divides any buildings, and is not conformable with the regulations of this Act, and to build instead a party wall conformable thereto"; sub-ss. 4 and 5 give certain other rights which are not material for the present purpose; and then by sub-s. 6, which is the material sub-section, he is to have a right "to raise and underpin any party structure permitted

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by this Act to be raised or underpinned, or any external wall built against such party structure, upon condition of making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof, and of carrying up to the requisite height all flues and chimney stacks belonging to the adjoining owner on or against such party structure or external wall." Now, with regard to the words "making good all damage," &c., it is to be observed that the damage thereby intended is not confined to physical damage to the party structure itself, but extends to damage to the premises of the adjoining owner, which are adjacent to the wall. It is further to be observed that in this sub-section we do not find the word "compensation" at all. It is in this respect unlike sub-s. 6 of s. 87, which provides that "where in either of the cases aforesaid," namely, cases where an owner wishes to build along the line of junction between his land and that of an adjoining owner an external wall on his own land, "the building owner proceeds to build an external wall on his own land, he shall have a right at his own expense at any time after the expiration of one month from the service of the notice to place on the land of the adjoining owner below the level of the lowest floor the projecting footings of the external wall with concrete or other solid substructure thereunder, making compensation to the adjoining owner or occupier for any damage occasioned thereby, the amount of such compensation, if any difference arise, to be determined in the manner in which differences between building owners and adjoining owners are hereinafter directed to be determined." Therefore, in that sub-section, not only is the word "compensation" used, which is not to be found in s. 88, sub-s. 6, but there is also a specific provision that, in the event of difference, the amount of such compensation shall be fixed by the statutory tribunal of surveyors provided for by s. 91. Though s. 88, sub-s. 6, undoubtedly gives a right to the adjoining owner to have made good, not merely damage to the party wall, but all damage to the adjoining premises, or to the internal finishings and decorations thereof, I am not quite sure whether that means that there is to be a right to have pecuniary damages awarded in respect of those matters, or that the building owner shall himself physically

make good such damage as a condition of his right to do the work mentioned in the sub-section; but, be that as it may, I think the intention of the Act is that all questions as to whether any, and, if so, what damage has been occasioned by the work to the adjoining premises or the internal finishings and decorations thereof, and as to the making good of such damage, shall be dealt with by the tribunal constituted under s. 91, though there is no express statement that differences which may arise as to such questions shall be determined by them. But, however this may be, it seems clear that the damage referred to in s. 88, sub-s. 6, of the Act is physical damage to the structure or internal fittings of the adjoining premises, and has nothing to do with trade damage personally sustained by the owner or occupier of those premises.

The next important section with which I propose to deal is s. 90, but I may refer in passing to s. 89, which deals with the rights of an adjoining owner as against a building owner exercising his rights under s. 88, and provides that he may require the building owner to do certain works with regard to the party structure "where the execution of the required works will not be injurious to the building owner or cause him unnecessary inconvenience or unnecessary delay in the exercise of his right," and that "any difference that arises between a building owner and adjoining owner in respect of the execution of any such works shall be determined in manner in which differences between building owners and adjoining owners are hereinafter directed to be determined." No question of any right to damages arises under s. 89, but there are questions to be decided such as whether the works required by the adjoining owner will be injurious to the building owner or cause him unnecessary inconvenience or delay, and in my judgment these are matters which have to be determined by the statutory tribunal. Then we come to s. 90, which gives rules as to the exercise of rights by building owners and adjoining owners, and in particular provides that "(3.) a building owner shall not exercise any right by this Act given to him in such manner or at such time as to cause unnecessary inconvenience to the adjoining owner or to the adjoining occupier." Here again, in my opinion, any question

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which may arise as to whether the right given to a building owner is being exercised in such manner or at such time as to cause unnecessary inconvenience to the adjoining owner or occupier is a matter which is intended to be dealt with by the statutory tribunal under s. 91. If a building owner in the course of exercising his rights under the Act does any wrong to an adjoining owner in respect of any matter collateral to the work which he is executing, e.g., if he blocks ancient lights to which the adjoining owner is entitled, there is nothing, so far as I can see, in the Act which gives to the tribunal constituted under s. 91 jurisdiction in such a matter to the exclusion of the jurisdiction of the High Court to give relief by injunction and to prevent the continuance of that collateral wrong; but, if the question is merely whether the right of the building owner is being exercised in such manner or at such time as to cause unnecessary inconvenience to the adjoining owner or occupier, then, though I do not think that we have to decide that point in the present case, I am disposed to think that that question is one which it is intended that the statutory tribunal should have exclusive jurisdiction to decide. Then I come to s. 91, sub-s. 1, which provides that "in all cases not specially provided for by this Act, where a difference arises between a building owner and adjoining owner in respect of any matter arising with reference to any work to which any notice given under this part of this Act relates, unless both parties concur in the appointment of one surveyor, they shall each appoint a surveyor, and the two surveyors so appointed shall select a third surveyor, and such one surveyor, or three surveyors, or any two of them shall settle any matter from time to time during the continuance of any work to which the notice relates in dispute between such building and adjoining owner, with power by his or their award to determine the right to do, and the time and manner of doing, any work, and generally any other matter arising out of or incidental to such difference; but any time so appointed for doing any work shall not, unless otherwise agreed, commence until after the expiration of the period by this part of this Act prescribed for the notice in the particular case." I have already said that I am disposed to think myself that, if a question arises as to whether or not the building owner is exercising

the right given to him by s. 88, sub-s. 6, in such a manner as to cause unnecessary inconvenience to the adjoining owner, that is a question which it would be for the statutory tribunal to decide, if called on to do so by the building owner or the adjoining owner; but of course the fact that they had to decide that question would not on the face of it necessarily involve the further proposition that the tribunal having the right and the duty to decide that question should therefore have the power of saying whether any, and what, compensation should be paid, or what remedy should be given in respect of such unnecessary inconvenience, if any, to the adjoining owner or occupier. It may be that the remedy is that, if the special statutory tribunal decides that unnecessary inconvenience is being caused to the adjoining owner or occupier, the building owner thereupon loses the protection of the Act. If that question had to be dealt with only in relation to future acts of the building owner, there might not be so much difficulty; but suppose the question comes before the statutory tribunal whether a building owner has in the past so exercised his rights as to cause considerable unnecessary damage to the adjoining owner, what then? Is the only remedy to be an action in the High Court, if such an action would lie? I think that is a question of considerable difficulty. For the purpose of dealing with it, one must consider what the provisions with regard to compensation are under the Act.

I have already called attention to the use of the word "compensation" in s. 87, sub-s. 6, and to the fact that s. 88, sub-s. 6, speaks of making good damage to the adjoining premises, but does not use the word "compensation" at all. When one looks at the later sections, one finds that in s. 93, which provides that under certain circumstances a building owner may underpin an adjoining owner's building (which is not what is being done in this case), sub-s. 3 provides that "the building owner shall be liable to 'compensate' the adjoining owner and occupier for any inconvenience, loss, or damage which may result to them by reason of the exercise of the powers conferred by this section." There again the word "compensate" is used, as in s. 87, sub-s. 6, to which I have called attention, but there is no provision as to the tribunal by which that compensation is to be awarded. Sect. 87,

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sub-s. 6, provides that the compensation under that sub-section shall be determined by the statutory tribunal, but s. 93, sub-s. 3, like s. 88, contains no provision for arbitration by that tribunal. Again, when one comes to s. 95, one finds in sub-s. 2 (*b*) a provision that, if a sound party structure is pulled down and rebuilt by a building owner, "the expense of pulling down and rebuilding the same and of making good any damage by this part of this Act required to be made good, and a fair allowance in respect of the disturbance and inconvenience caused to the adjoining owner, shall be borne by the building owner." In that sub-section the word "compensation" is not used, and there is no provision as to the tribunal which is to deal with the question of making good the damage, or the fair allowance to be made to the adjoining owner for disturbance and inconvenience. So that really, in dealing with the subject-matters under the Act which are obviously suitable for determination by the statutory tribunal constituted by the Act, one has every variety of case. First there is s. 87, sub-s. 6, which uses the word "compensation," and provides in terms that the statutory tribunal shall deal with the compensation given by that section; but, oddly enough, there does not appear to be any other section in the Act which points out the statutory tribunal as being the tribunal to award anything in the nature of compensation. Then there is s. 88, sub-s. 6, which speaks of making good damage to the adjoining premises, apparently dealing, as I have pointed out, only with physical damage to those premises, and, though the question as to the necessity and manner of making good such damage may be one for the skilled tribunal, there is no specific provision as to how the obligation of doing so is to be enforced. Then, when one comes to s. 93, sub-s. 3, one finds the word "compensate" used, but there is no mention of the tribunal which is to award the compensation. Again, s. 95, sub-s. 2 (*b*), as I have pointed out, provides that a fair allowance shall be made to the adjoining owner for disturbance and inconvenience caused to him by the exercise of the powers of the section, but does not say how the amount of that allowance is to be arrived at, or what tribunal is to deal with it. Speaking for myself, I am disposed to think

that in all the cases in which the Act provides for compensation the intention is that the amount of compensation is to be determined by the statutory tribunal, to which is also relegated the determination of the questions which form conditions precedent to the existence of the right to compensation. There are apparently no express words by which this is provided except in the case of s. 87, sub-s. 6, but it would be extremely inconvenient if two inquiries were necessary, one by the special tribunal to ascertain whether the conditions precedent to the right to compensation existed and another before some other tribunal to determine the amount of the compensation.

I have gone at some length into these matters because I think it was agreed on all hands that, whatever differences there might be as to what was the exact nature of the claim set up by the appellant before the arbitrators and rejected by them, it would be desirable that we should deal in the first instance generally with the meaning and intention of the Act; but, having done that, one is brought back again to the question whether in this case there was a claim for damage in respect of which evidence was tendered before the statutory tribunal, which it was their duty under the Act to receive. I think not. For some time during the argument I thought that there was a claim made, which the evidence tendered might or might not substantiate, under s. 90, sub-s. 3, in respect of what I may call excessive or unnecessary inconvenience caused to the adjoining owner by the action of the building owners. But I have come to the conclusion that no claim was really made before the special tribunal that they should hear evidence of excessive or unnecessary inconvenience caused by the operations of the respondents to the appellant. The claim made was, I think, simply a claim that by the exercise of their rights under s. 88, sub-s. 6, of the Act, the building owners had caused damage and inconvenience to the adjoining owner. I have already said that, in my opinion, the mere exercise of such rights cannot afford any ground for compensation under the Act. The Act establishes certain mutual rights as between the adjoining owners in respect of the party wall in substitution for the old rights of tenants in common of a party wall, and the building owners exercised the rights so given

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to them; and, under those circumstances, I think the mere exercise of those rights can give no right to compensation under the Act. At common law, if all that one tenant in common did was to exercise his right as such, the other tenant in common had no cause of action against him for so doing. The case of *Cubitt* v. *Porter* (1) shews that, if one tenant in common builds on the top of the wall, that is no ouster of the other tenant in common, whose only remedy is to pull down the new building. So here, if all the building owners did was to exercise their rights under s. 88, that would not constitute a cause of action or ground for compensation under the Act, and I cannot make out that any claim was ever made before the statutory tribunal other than a claim for compensation in respect of the mere exercise of those rights. Under these circumstances I cannot see my way to the conclusion that the judgment of the Divisional Court was wrong, and I think that this appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. This case raises a simple, but fundamental, question on the meaning of the provisions of Part VIII. of the London Building Act, 1894. That enactment is one which is intended to regulate the relations between building owners and adjoining owners whose property is separated by a party wall, whether that wall is one of which they are tenants in common or not. It is evident that the nature of the rights which, under the common law on the subject, the two tenants in common of a party wall possessed was such that each of them might play what I may call a dog-in-the-manger part. One of them might refuse to strengthen the wall, or to raise it to the full extent of which it was capable, or to allow the other to do so, and in that way useful development of buildings might be prevented. The law has therefore interposed, and has given to the two owners of such a wall wide reciprocal rights against each other. In the case with which we have to do, s. 88 is the most important section on the subject. That section gives, in the most definite language, certain rights to each of the adjoining owners in respect of a "party structure," which includes a "party wall." Sub-sect. 6 relates to the case with which we

(1) 8 B. & C. 257.

have to deal. It provides that a building owner shall have a right "to raise and underpin any party structure permitted by this Act to be raised or underpinned, or any external wall built against such party structure, upon condition of making good all damage occasioned thereby to the adjoining premises or to the internal finishings and decorations thereof, and of carrying up to the requisite height all flues and chimney stacks belonging to the adjoining owner on or against such party structure or external wall." The first thing that strikes one about that provision is that the right is given upon condition of doing something, not on the terms of making any payment. That it meant that the building owner should have power to do the things specified upon that condition, and there should not be imposed upon him any liability to pay any compensation in respect of the exercise of that power, seems to me to be clear from s. 92, which gives to the building owner the right to enter upon the premises of the other for the purpose of doing such work as he has become entitled or is required by the Act to do; and so absolute is that right that he may break open premises for the purpose if entrance is denied. Further, it is clear, in my opinion, that it is intended that he himself shall do the work which is made a condition of his right to raise the wall. That this is so appears, I think, from s. 95, of which sub-s. 1 deals with the expense of work which is to be borne by the building owner and the adjoining owner jointly, and sub-s. 2 deals with the expense which is to be borne by the building owner alone, under which latter head it is provided by clause (*a*) that, if a party structure be raised, the expense of raising the same, and of "making good all damage occasioned thereby," and of carrying up to the requisite height all flues and chimney stacks belonging to the adjoining owner on or against any such party structure as are by the Act required to be made good or carried up shall be borne by the building owner. So that there is an express provision that not only shall he do the work, but also that he shall bear the expense of it himself. For what is meant by "making good all damage occasioned thereby" one must refer to s. 88, sub-s. 6, from which we find that it is "all damage occasioned thereby to the adjoining

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premises or to the internal finishings and decorations thereof." So that the whole fasciculus of clauses indicates that the Legislature has deliberately given to the building owner the right to raise the party wall upon condition of making good all damage thereby occasioned to the adjoining premises or the internal finishings and decorations thereof. The respondents admit their obligation to do this, but the appellant says that, in addition to this, which is the condition of the right given to the building owner, they must also pay compensation to her, as an adjoining owner, for what I may call the annoyance inflicted upon her by the operation of raising the wall. The argument in this case has lasted a long time, but I have not heard a single word which, in my opinion, can raise a doubt that no such right as that claimed is given by the Act. It is not that this part of the Act does not contemplate cases in which compensation is to be given for annoyance to the adjoining owner, but these cases are clearly defined in the Act, and are widely different in their nature from the case of a party wall, so that the express provision for compensation with regard to them, and the absence of any corresponding language with regard to the much more important and more frequently occurring case of a party wall greatly strengthen, in my opinion, the argument for the respondents. Let me take the cases in which reference is made by the Act to compensation. First, there is s. 87, sub-s. 6, which provides for the case in which a building owner proposes to build an external wall on his own land, but to place the footings of the new wall on land of the adjoining owner below the level of the lowest floor. In that case the sub-section gives to the building owner the right to put the footings of his wall on the land of his neighbour. That is not a case of a party wall, and, naturally enough, the right is in that case given on condition of making compensation to the adjoining owner or occupier for the damage or inconvenience occasioned thereby. The next case is that provided for by s. 93, where a building owner proposes to erect a building within ten feet of a building belonging to an adjoining owner, and therefore for his own security needs to underpin the adjoining owner's building, an operation which must be carried out on that owner's land. In that case the right of doing so is

given to the building owner on the terms that he shall be liable to compensate the adjoining owner and occupier for any inconvenience, loss, or damage occasioned to them by the exercise of the right so given. In both these cases the building owner is obtaining under the Act power to do work for his own purposes upon land of another person, and the Act very properly provides that he shall compensate that other person for any damage thereby occasioned to him. There is, I believe, a third case under the Act in which provision is made for compensation, which is equally distinct from the case of a party wall, but it is not necessary to refer to it more particularly.

Reference has been made to cases in which railway companies are required by statute to give compensation in respect of interference with adjoining property. But in my opinion, the analogy of cases in which, on grounds of public policy, power is given by Act of Parliament to a company to interfere with the property of others, and compensation for such interference is given (as in the case of a railway company) is entirely inapplicable to the present case. The compensation for the right given to one of two adjoining owners of a party wall to build on the wall in which the other owner is interested is that the latter has a reciprocal right himself of doing so with regard to the same wall. It is not to be expected, as it appears to me, that in a case of this kind the Act would give compensation to one of the two adjoining owners for annoyance occasioned to him by the exercise by the other of the right given to him by the Act, because the Act gives reciprocal rights to the former over the subject-matter with regard to which the rights are given to the latter. It is therefore not only comprehensible, but also just, that the Legislature should in this case have given the right to raise the party wall simply upon the condition that all structural damage occasioned to the adjoining premises, or the internal finishings and decorations thereof, should be made good by the person who exercises the right of raising the wall.

This exhausts the question, as it seems to me, but it does not exhaust the subject-matter of the argument, because the appellant's counsel admitted that, if s. 88 stood alone, he would have no case, and that he must, in order to make out his

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case, have recourse also to ss. 90 and 91 of the Act. In my opinion, they do not affect the matter. They merely provide the practical machinery for working out the policy of the Legislature with regard to the rights given to adjoining owners by the Act. Sect. 90 provides that, though these rights are given, they shall not be exercised without notice being given to the adjoining owner and a period of two months being allowed to elapse, in order that he may give a counter-notice as to works which he may desire to have done in connection with the work proposed to be done upon the wall. It also provides for proper shoring for the protection of the adjoining premises, and for the work being carried out in such a manner and at such a time as not to cause unnecessary inconvenience to the adjoining owner or the adjoining occupier, or, in other words, that the building owner shall use his rights reasonably so as not to cause unnecessary damage to the adjoining owner or occupier. That provision clearly opens up the question as to what is unnecessary inconvenience in each particular case, and the Legislature has constituted a practical tribunal for deciding such questions. Unless consent is given to the work by the adjoining owner, or occupier, as the case may be, (in which case no question can arise,) questions and disputes that arise as to the manner and time of exercising the right given to the building owner are to be referred to the special tribunal constituted under s. 91. That tribunal is to settle any matters from time to time during the continuance of the work in dispute between such building and adjoining owner, with power by its award to determine the right to do, and the time and manner of doing, any work, and generally any other matter arising out of or incidental to such difference. It is a tribunal created for certain special purposes, but the creation of that tribunal does not, as it appears to me, in any way add to, or subtract from, the rights of the parties as clearly defined by the Act; it only provides a short and, it is hoped, easy mode of settling in detail what those rights are. For the purpose of ascertaining what is the nature of the rights given by the Act, the provisions with regard to this tribunal may therefore be put aside. I think that ss. 90 and 91 do not affect the question. Many questions were raised in the course

of the argument as to whether, in certain particular cases in which the Act directs that compensation shall be made, or in cases where there has been any excess by the building owner, and he has done acts not covered by Part VIII. of the Act, the special tribunal has power to adjudicate. I confess that, as at present advised, I, personally, am disposed to think that, with regard to any act of the building owner outside the provisions of Part VIII., the special tribunal would have no jurisdiction; but at the same time I think that it would have the widest powers of determining the manner and time of doing the work, so as not to cause unnecessary inconvenience to the adjoining owner or occupier. But it appears to me to be unnecessary to decide these questions, because I hold that the adjoining owner has no right to compensation for any inconvenience caused by operations which the Act has given the building owner a right to carry out, so long as the latter acts within the provisions of the Act, for, so long as he does so, his action is lawful. The conditions on which he is permitted to perform the work authorized by the statute do not involve any payment of compensation to the adjoining owner, and, the acts done by him being lawful, nothing is due from him by way of damages. For these reasons I am of opinion that the claim made by the appellant before the arbitrators was not determinable by them, and that they rightly refused to hear the evidence tendered.

BUCKLEY L.J. The discussion in this case has wandered over a very wide field, but the point for decision lies within a small compass. Between Nos. 33 and 34, John Street, Edgware Road, was a party wall, standing partly on the land of the one and partly on the land of the other of two adjoining owners. The appellant carried on upon No. 33 the business of a restaurant keeper. The respondents did certain work upon the party wall by which the appellant asserted that she was injured, and, among other things, she claimed damages for loss of trade in her business as a restaurant keeper. The whole question is, whether the alleged damage for loss of trade was capable of being adjudicated upon by the statutory tribunal established by the London Building Act, 1894. The question appears to me to be simply whether

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the words in s. 88, sub-s. 6, "damage occasioned thereby," &c., include damage occasioned to the trade of the adjoining owner by work done by the building owner under that sub-section. The effect of the Act of 1894, so far as this question is concerned, is that, the party wall being a subject-matter in respect of which each of the adjoining owners has certain rights of property, either of those owners has under the Act a right to carry out upon the wall which is not his sole property, but in which the other also has rights of property, certain work upon terms which are defined by the Act. On looking through the Act to see where it provides that any such damage as that claimed by the appellant is to be the subject of adjudication under it, I have failed to find anything applicable to that subject-matter. The Act deals with the property in the wall, and gives to either of the adjoining owners, neither of whom is the sole owner of the wall, the right to do certain work, notwithstanding the rights of the other in the wall, upon certain conditions; but there is nothing, so far as I can see, in the Act which enables the statutory tribunal thereby constituted to deal with any interference with any other right of property of the adjoining owner, as, for example, any interference with a right of light which he might have in respect of windows so situated in the neighbourhood of the party wall that they might be affected by the operations carried on by the building owner upon that wall, which right is expressly saved by s. 101, or with any business which he might be carrying on upon the adjoining premises. What is dealt with by the Act is the adjoining owners' rights of property in the wall and certain other matters incidental thereto. There are three different states of things which appear to be contemplated by different sections of the Act. One is that contemplated by s. 87, that is where there is no party wall, but one of two adjoining owners proposes to erect a party wall or an external wall on his own land. Another is that contemplated by s. 93, where a building owner is proposing to undertake building operations on his own land which may cause a danger of subsidence to the buildings of the adjoining owner by interfering with their support. With those cases we have nothing to do, though the provisions with regard to them may throw some

light on the matter with which we are dealing. The case with which we have to deal is that contemplated by s. 88. To all these cases certain other sections are applicable, namely, ss. 91 and 92, and also, I think, s. 90. On looking at the Act I find that in the first case, namely, that contemplated by s. 87, sub-s. 6, and also in the case contemplated by s. 93, sub-s. 3, the Act does make provision for compensation by the building owner to the adjoining owner for damage occasioned by the work, but there are no similar provisions in s. 88, sub-s. 6, with regard to a party structure. The fact that such express provisions are contained in s. 87 and s. 93 tends to shew that the Legislature deliberately abstained from making any such provision in s. 88, sub-s. 6. Looking at s. 88, sub-s. 6, I find that it gives a right to a building owner to interfere as therein mentioned with a party structure upon condition of making good all damage occasioned thereby to the adjoining premises or the internal finishings and decorations thereof, and of carrying up the adjoining owner's flues and chimneys to the necessary height. Sect. 88 divides itself into two parts. The first five sub-sections deal with cases in which the building owner is going to do work upon the party wall because it is not what it ought to be, because it requires repair, or is defective or not conformable to the Act, or because rooms or storeys in connection therewith are not conformable to the Act. In none of these cases is it provided that he is to make good any damage. Sub-sects. 6 to 10 deal with cases where he proposes to interfere with the wall, not because it is for the benefit of both parties, but because he wants to do so for his own purposes. In each of these cases it is provided that he is to make good all damage occasioned to the adjoining premises. There is also another section, namely, s. 95, sub-s. 2 (*b*), which deals with another case in which a building owner proposes to interfere with a party wall for his own purposes. That is a case where the wall is constructed of proper materials, and is in a sound condition, but he desires to pull it down because it is not thick enough to support what he wishes to build on the top of it, or because for some other reason he desires to alter it. In that case he is to make good damages by this part of the Act required to be made good,

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and to make a fair allowance in respect of the disturbance and inconvenience caused to the adjoining owner. In the cases contemplated by sub-ss. 6 to 10 of s. 88, and s. 95, sub-s. 2, where the building owner is going to do something to the wall which is the joint property of himself and the adjoining owner because it suits his own purposes, he is to make good all damage, not only in relation to the wall, but to the adjoining premises. Therefore, if a building owner wishes to interfere with a party wall because it suits him to do so, he must make good all structural damage, not only to the wall, but to the adjoining premises, and also to their internal finishings and decorations, and must carry up to the necessary height all flues and chimneys of the adjoining premises; but I can find no provision that, as the price of exercising the right which the Act gives him, he is to pay any compensation in respect of injury to other property of the adjoining owner. If the adjoining owner has any right of light, or any other right of property, which is affected by the work, as, for instance, a business which is damaged, possibly he may have some other remedy, but he has no remedy under the Act. The function of the statutory tribunal is to see whether the terms upon which the right to interfere with the wall given by the Act is to be exercised have been carried out or not, but those terms do not, in my opinion, include any right of compensation for any injury which may have been done to the adjoining owner in respect of damage other than damage to the wall, or the structure or internal finishings and decorations of the adjoining premises. It seems to me therefore that the arbitrators were right in excluding the claim for loss of business which was put forward by the appellant.

Appeal dismissed.

Solicitor for appellant: *William Stubbs.*

Solicitors for respondents: *Mackrell, Maton, Godlee & Quincey.*

E. L.

[IN THE COURT OF APPEAL.]

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July 19.

WELLS *v.* HUGHES; DISTRICT LOAN COMPANY, CLAIMANTS.

Interpleader—County Court—Execution—Goods belonging neither to the Execution Debtor nor to the Claimant—Money paid into Court, who entitled to—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 156.

Goods, which had been taken in execution upon a county court judgment, were claimed by the grantees of a bill of sale upon them, hereinafter called "the claimants," who deposited under s. 156 of the County Courts Act, 1888, a sum of money as representing the value of the goods. The high bailiff of the county court thereupon withdrew from possession of the goods, and issued an interpleader summons in the county court with regard to the money in court. Subsequently E. D. & Co. gave notice to the high bailiff of a claim to part of the goods, as having been let by them to the execution debtor on a hire purchase agreement, and the claimants gave notice to the high bailiff that they withdrew their claim to those goods. The high bailiff gave notice of the claim of E. D. & Co. to the execution creditor, who thereupon gave notice to the high bailiff that he admitted their title to those goods. Upon the hearing of the interpleader summons the county court judge held that the above-mentioned bill of sale was invalid, and he thereupon ordered that a part of the money in court proportionate to the value of the goods which had not been claimed by E. D. & Co. should be paid out to the execution creditor, but that the remainder of the money should be paid back to the claimants. On appeal the Divisional Court affirmed his decision:—

Held (reversing the judgment of the Divisional Court), that the execution creditor, upon the failure of the claimants to prove a title to any of the goods, was entitled to the whole of the money in court.

APPEAL from the judgment of a Divisional Court (Ridley and Darling JJ.), dismissing an appeal from the judge of the Llanelly County Court.

The plaintiff Wells obtained judgment in the Leicester County Court against the defendant Hughes for the sum of 19*l.* 17*s.* for debt and costs; and, the warrant for execution being sent to the registrar of the Llanelly County Court, who was also high bailiff of that court, he seized certain goods in execution upon that judgment. The District Loan Company, hereinafter called "the claimants," claimed the goods so seized under a bill of sale;

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and, the execution creditor, Wells, disputing their title to the goods, the claimants on January 17, 1906, deposited with the high bailiff the sum of 25*l.* 10*s.*, being the amount of the judgment debt and costs, execution fee, high bailiff's fee, and expenses, at which amount the value of the goods had been appraised, under s. 156 of the County Courts Act, 1888, and the high bailiff thereupon withdrew from the possession of the goods. After the money had been so deposited, and the high bailiff had so withdrawn from possession, he issued, with reference to the money paid into court, an interpleader summons, in which the claimants were stated to be claimants of the value of the goods taken in execution, and which was returnable on February 5, 1906. Subsequently, on January 31, Messrs. Evan Davies & Co., of Llanelly, who appeared to have let a portion of the above-mentioned goods to the execution debtor on the hire purchase system, gave notice to the high bailiff of a claim to that portion of the goods; and the high bailiff on the same day sent notice to the execution creditor of that claim, and that, if he admitted the title of Evan Davies & Co. to the said goods, and gave notice to that effect to the high bailiff by return of post, he would not be liable for any costs incurred after the receipt by the high bailiff of that notice. On the same date the claimants gave notice to the high bailiff, and to the execution creditor's solicitors, that they abandoned their claim to the goods claimed by Evan Davies & Co. On February 1 the execution creditor's solicitors wrote to the claimants' solicitors claiming that, as the claimants had withdrawn their claim to those goods, their client was entitled to be paid the value of them out of the money in court. On February 2 the high bailiff purported to issue a second interpleader summons, in which the claimants and Evan Davies & Co. were both stated to be claimants of the goods taken in execution, and which was also made returnable on February 5. On the same date the execution creditor's solicitors gave the high bailiff notice that their client admitted the title of Evan Davies & Co. to the goods claimed by them. At the hearing of the interpleader summons Evan Davies & Co. did not appear, and the county court judge decided that the bill of sale upon which the claimants based their title was invalid, and therefore the execution

creditor succeeded on the issue; but the judge ordered that only a part of the money in court proportionate to the appraised value of the goods which were not claimed by Evan Davies & Co., namely, 7*l.* 15*s.* 5*d.*, should be paid out to the execution creditor, and that the remainder of the money should be paid back to the claimants.

On appeal the Divisional Court affirmed his decision.

G. W. Powers, for the execution creditor. Upon the failure of the claimants to make out their title to any of the goods taken in execution, the execution creditor was entitled to have the whole of the money in court paid out to him. It is quite immaterial for the present purpose that the execution creditor admitted, after the money had been paid into court and the bailiff had withdrawn from possession of the goods, that some of the goods belonged to Evan Davies & Co. Upon the money being paid into court, and the bailiff's withdrawing from possession, the goods were free of the execution, and no longer in the custody of the law; and it is open to Evan Davies & Co., if they have not retaken possession of such of the goods as belong to them, to claim possession of them from anyone who may now be in possession of them. Under s. 156 of the County Courts Act, 1888, the money is paid into court "to abide the decision of the judge upon such claim," i.e., the claim of the claimant, and, if the claimant fails to make out a title in himself, the execution creditor is entitled to the money. [He cited *Green* v. *Rogers* (1); *Richards* v. *Jenkins* (2); *Smith* v. *Critchfield* (3); *Haddow* v. *Morton* (4); *Kotchie* v. *Golden Sovereigns, Ld.* (5)]

S. P. J. Merlin (*George Jones* with him), for the claimants. The money in court represents the goods: see per Brett M.R. in *Smith* v. *Critchfield*. (6) If the goods were still in the custody of the law, the execution creditor having admitted that a portion of the goods taken in execution belonged to Evan Davies & Co., and not to the execution debtor, and therefore could not rightfully be taken in execution, the Court could not order

(1) (1845) 2 C. & K. 148.
(2) (1887) 18 Q. B. D. 451.
(3) (1885) 14 Q. B. D. 873.
(4) [1894] 1 Q. B. 95.
(5) [1898] 2 Q. B. 164.
(6) 14 Q. B. D. 873, at p. 877.

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that the execution should proceed with regard to that portion of the goods. The execution creditor has practically abandoned the execution as regards those goods. The county court judge has under s. 157 of the County Courts Act, 1888, full power to make such order as he may think fit, and as may be just, on the hearing of the interpleader summons. It being clear by the execution creditor's own admission that a portion of the goods ought not to have been taken in execution, the proportion of the money in court which represents that portion of the goods was rightly ordered to be repaid to the claimants. The result otherwise would be that the execution debtor's debt would be paid out of the claimants' money. It is fallacious to apply the analogy of an interpleader issue in the High Court, where possibly, by reason of the form of the issue, the onus may be thrown on the claimant of proving a title to the goods in himself. Upon an interpleader summons in the county court, the real question is whether the goods were rightly taken in execution, and the county court judge may in his discretion deal with the whole matter according to the equity of the case as between the parties. The claimants did not by claiming the goods which belonged to Evan Davies & Co. really prejudice the execution creditor, because by his own admission those goods were not subject to the execution, and the bailiff can now proceed to levy execution on other goods belonging to the execution debtor, if any. Therefore to make the claimants pay the execution debtor's debt so far as the value of those goods is concerned would be unjust. [He referred to Order XXVII., r. 1, and r. 15, sub-r. 8, of the County Court Rules, 1903.]

G. W. Powers, for the execution creditor, was not called on to reply.

VAUGHAN WILLIAMS L.J. I regret to say that I think we must allow this appeal, for I should have been glad if the law on the matter would have admitted of a different result. In this case the claimants paid into court a sum equal in amount to the execution creditor's judgment and expenses, and, as I understand the facts, it must be taken that, upon payment of that amount into court, the high bailiff retired from possession of the goods taken in execution, and left them free goods, no longer in the

custody of the law. If the goods could have been regarded as remaining in the custody of the law after payment of money into court, there might be some ground for treating the money as symbolical of the goods, and as having been paid in, not in respect of the execution creditor's judgment debt, but as representing pound for pound the value of the goods. But that view would not be consistent, I think, with the facts of this case. It is argued that to the extent that the execution creditor admitted the claim of Evan Davies & Co. he abandoned his execution as to that part of the goods which they claimed, and pro tanto his claim to the money paid into court. I can, however, see no evidence whatsoever that he in any degree abandoned his execution, or his right to come upon the money in court to whatever extent the claimants might fail to prove their title to the goods seized in respect of which that money was paid in. Under those circumstances I think that the claim made by the execution creditor's solicitors in their letter to the claimants' solicitors dated February 1, 1906, to the effect that, as the claimants had withdrawn their claim to the goods claimed by Evan Davies & Co., the execution creditor was entitled to be paid the value of those goods out of the money in court, was perfectly correct. The admission by the execution creditor of the claim made by Evan Davies & Co. might affect the rights as between himself and them; but, inasmuch as this money had then been paid into court, and the goods seized thereby made free of the execution, in my opinion the result is that the money in court would have to be paid over to the execution creditor, except to such extent as the claimants might be able to prove their title to the goods taken in execution. The claimants for the present purpose are strangers who have come forward and taken upon themselves to interfere with the execution. Their right so to interfere must depend on the extent to which they can prove a title in themselves to the goods seized, and, as in the present case they have failed to prove a title to any of those goods, they fail altogether on the interpleader issue with regard to the money in court, and therefore the execution creditor is entitled to the whole of that money. For these reasons I think the appeal must be allowed.

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FLETCHER MOULTON L.J. I am of the same opinion. The short facts are that, certain goods having been taken in execution upon a judgment obtained by the plaintiff Wells against the defendant Hughes in the county court, the District Loan Company claimed those goods as belonging to them under a bill of sale. There were under s. 156 of the County Courts Act, 1888, three alternatives open to the claimants under the circumstances. They could deposit with the bailiff the amount of the value of the goods claimed, to be by him paid into court "to abide the decision of the judge upon such claim," or the sum which the bailiff was allowed to charge for keeping possession of the goods until the decision could be obtained, or they might give security for the value of the goods. Wishing to get possession of the goods, they adopted the first alternative, and paid into court a sum sufficient to cover the judgment debt and charges, as representing the value of the goods. It seems to me clear that it was not really the value of the goods, though in strictness it should have been. That having been done, the high bailiff withdrew from possession of the goods, which were then free, the remedy of the execution creditor being no longer against the goods seized, but against the money in court. What was equivalent to an interpleader issue in the High Court was then directed, in which the claimants were plaintiffs, as they had to prove their title to interfere with the process of the Court. As to part of the goods they withdrew their claim before the hearing of the summons. As to the remainder they failed on the hearing, because their bill of sale was held to be invalid. The consequence was that the execution creditor succeeded altogether upon the issue, and became, in my opinion, entitled to have the money in court, representing his debt and costs, paid out to him. It is argued that this is unfair, because the goods taken in execution included goods which did not belong to the execution debtor, and which, therefore, he could not transfer by the bill of sale. If the claimants had known that at the time of the payment into court, probably they would not have imperilled their money by paying it into court in order to get possession of the goods,—a possession which they could not maintain, because those goods had never belonged to the judgment debtor. It was open to them to take other courses

by which their money would not have been imperilled, but they elected to pursue this course. What happened between the date of the payment into court and the bailiff's consequent withdrawal from possession and the date of the hearing was, I think, immaterial, and could not affect the situation as between the claimants and the execution creditor. The question whether the goods claimed by Evan Davies & Co. were theirs or the execution debtor's at the date of the bill of sale, and whether he was justified or not in giving the bill of sale in respect of them, was not before the Court on the interpleader issue, and could not be brought before them. The true owners of these goods had not to interfere with any process of the law in order to get possession of them, because they were no longer in the custody of the law, and any claim which they might have to the goods could not be the subject of the interpleader issue. The simple fact is that the claimants in this case wish to make the execution creditor bear the consequences of their rashness in paying money into court without ascertaining whether they had a title to the goods in question.

BUCKLEY L.J. I am of the same opinion, for the following reasons. Certain goods having been taken in execution upon a judgment in the county court, the District Loan Company claimed them under a bill of sale. The position therefore was this: The execution creditor asserted that the goods belonged to the judgment debtor; the claimants asserted, on the contrary, that the goods were theirs; in that state of things the claimants paid into court 25*l.* 10*s.*, being the amount of the judgment and expenses; and, to use the language of s. 156 of the County Courts Act, 1888, that sum was "to abide the decision of the judge upon such claim," i.e., the claim of the District Loan Company. The payment into court having been made, the high bailiff on the same day withdrew from possession of the goods, and issued an interpleader summons with reference to the money paid into court. That summons was in due course heard, and the result was that the claim of the District Loan Company failed, and the issue was decided in favour of the execution creditor. It necessarily followed, in my opinion,

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that he was entitled to the whole of the money paid into court. The argument to the contrary is as follows. After the money had been paid into court, Evan Davies & Co. made a claim to a portion of the goods, and the claimants, thinking that this claim was well founded, withdrew their claim as to that portion of the goods. That is a transaction with which the execution creditor had nothing to do. It is true that he afterwards admitted the title of Evan Davies & Co. to those goods; but, the money having been paid into court, it seems to me that it did not matter to him whether their claim was well founded or not. It is argued that, because he made that admission, he must be taken to have given up his claim to a rateable proportion of the money paid into court. I do not think that is so. In my opinion the effect of the payment into court was that the money was paid in by the claimants as a stake to abide the decision of the issue as to the validity of their claim to the goods, and as they failed to prove any title to them, the money paid in belongs to the execution creditor.

Appeal allowed.

Solicitors for execution creditor: *Bennett & Ferris, for Bray & Price, Leicester.*

Solicitor for claimants: *John T. Lewis, for Llewelyn Howell & Williams, Swansea.*

E. L.

Principle applied. MUNDAY *v.* METROPOLITAN POLICE DISTRICT RECEIVER. [1949] 1 All E.R. 337.

FIELD AND OTHERS *v.* THE RECEIVER OF METROPOLITAN POLICE.

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May 14, *July* 29.

Criminal Law—Riot—Intention to render mutual help against opposition—Force and Violence—Persons riotously and tumultuously assembled—Building injured or destroyed—Riot (Damages) Act, 1886 (49 & 50 *Vict.* c. 38), *s.* 2.

In order to constitute a riot five elements are necessary—(1.) a number of persons not less than three; (2.) a common purpose; (3.) execution or inception of the common purpose; (4.) an intent on the part of the number of persons to help one another, by force if necessary, against any person who may oppose them in the execution of the common purpose; (5.) force or violence, not merely used in and about the common purpose, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.

In an action under s. 2 of the Riot (Damages) Act, 1886, to recover compensation for the injury or destruction of a building by persons riotously and tumultuously assembled together, the following facts were proved:—At nine o'clock on a night at the end of October a number of youths of ages varying from fourteen to eighteen years were congregated together upon the foot-pavement of a road in a low neighbourhood shouting and using rough language. The pavement adjoined a nine-inch wall of considerable length inclosing a yard and let into a house. Some of the youths were standing with their backs against the wall, and others were running against them, or against the wall, with their hands extended. After they had gone backwards and forwards in this way for about fifteen minutes, the wall, to the extent of about twelve feet, fell. As soon as it fell the caretaker of the premises came out into the street, and the youths then dispersed in different directions:—

Held, that there was no evidence of any intention on the part of the youths to help one another by force if necessary against any person who might oppose them in the execution of their common purpose of injuring or destroying the wall, or of any force or violence (other than the force or violence used in the actual demolishing of the wall) displayed in such a manner as to alarm any person of reasonable firmness and courage; and therefore that the youths were not riotously and tumultuously assembled together within the meaning of s. 2 of the Riot (Damages) Act, 1886.

Semble, in order to sustain a claim under that section it is necessary to prove all the elements of a riot.

APPEAL from the Shoreditch County Court.

The action was brought to recover compensation under s. 2 of

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the Riot (Damages) Act, 1886 (1), for injury to a wall, belonging to a house numbered 84, Martindale Road, Canning Town.

The plaintiffs were the legal owners of the house and wall, and the defendant was the Receiver of the Metropolitan Police District.

At nine o'clock on the night of October 30, 1906, a number of youths of ages varying from fourteen to eighteen years were congregated together upon the foot-pavement of a road named Martindale Road, shouting and using rough language. The pavement adjoined a nine-inch wall of considerable length, enclosing a yard and toothed into a house. Some of the youths were standing with their backs against the wall, and others were running against them, or against the wall, with their hands extended. After they had gone backwards and forwards in this way for about a quarter of an hour, the wall, to the extent of from twelve to fifteen feet, fell. As soon as it fell, the caretaker of the premises came out into the street, and the youths then dispersed in different directions. There was evidence that the neighbourhood was a rough one, and that doors, windows, shutters, and water and gas fittings had been at other times destroyed, and that people had been frightened.

The county court judge found that the wall knocked down formed part of a building; that it was in such a state that it

(1) Riot (Damages) Act, 1886, s. 2 —"(1.) Where a house, shop, or building in any police district has been injured or destroyed, or the property therein has been injured, stolen, or destroyed, by any persons riotously and tumultuously assembled together, such compensation as hereinafter mentioned shall be paid out of the police rate of such district to any person who has sustained loss by such injury, stealing or destruction. . . ."

Sect. 3.—"(1.) Claims for compensation under this Act shall be made to the police authority of the district in which the injury, stealing, or destruction took place. . . ."

Sect. 4.—"(1.) Where a claim to compensation has been made in accordance with the regulations, and the claimant is aggrieved by the refusal or failure of the police authority to fix compensation upon such claim, or by the amount of compensation fixed, he may bring an action against the police authority to recover compensation in repect of all or any of the matters mentioned in such claim. . . ."

"(2.) If the amount of compensation for which such action is brought does not exceed 100*l.* the action shall be brought in the county court for any district in which any part of the police district is situate."

could not have been knocked down without considerable and repeated force; that the young men assembled on the pavement with the intention of knocking or pulling down the wall by force, and that, in pursuance of that intention, they did by force knock down the wall; that they did a wrongful act by violence; that their acts and conduct would occasion alarm to ordinary passengers; and that the mischief was done by the riotous and tumultuous conduct of the young men. He expressed his opinion that it was not necessary, in order to constitute a riot, that the parties accused of committing it should have any intention to defend each other against persons who might interfere with them.

He accordingly gave judgment for the plaintiffs for 3*l.* 10*s.*

The defendant appealed.

Horace Avory, K.C., and *James Roberts*, for the defendant. The county court judge has assumed as the basis of his judgment that it is sufficient to entitle the plaintiffs to recover compensation under s. 2 of the Riot (Damages) Act, 1886, if a wilful injury to property committed with violence, and occasioning alarm to ordinary passengers, is proved. That is not enough. The essence of the liability, although its incidence is changed from the inhabitants of the hundred to the police, is the same as it was before that Act. It is now, as it was formerly, necessary to prove a riot. The preamble of the Act recites that by law the inhabitants of the hundred or other area in which the property is damaged "by persons riotously and tumultuously assembled together" are liable in certain cases to pay compensation for such damage. Sect. 2 of the Act uses the same words; it enacts that where a house, shop, or building has been injured or destroyed "by any persons riotously and tumultuously assembled together" compensation is to be paid as therein provided. To constitute a riot at common law there must be a common intention on the part of three persons at least to carry out some object, and to assist each other against any who shall oppose them, and an executing of the same in a violent and turbulent manner to the terror of the people, whether the act intended be of itself lawful or unlawful: Hawkins' Pleas of the Crown, 8th

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ed. (Curwood, 1824) bk. 1, ch. 28, s. 4, vol. 1, p. 513; Russell on Crimes, 6th ed. vol. 1, p. 553. There is no evidence in this case of any intention on the part of the youths to assist one another against persons who should oppose them in carrying out their object. But such an intention is essential to a riot: *Reg.* v. *Cunninghame Graham* (1); Archbold, Criminal Pleading, 23rd ed. p. 1101. Under s. 2 of the Act 7 & 8 Geo. 4, c. 31, it was necessary to prove an actual or attempted felonious demolition of a house before damages could be recovered against the inhabitants of the hundred: *Reid* v. *Clarke* (2); *Drake* v. *Footitt* (3). That Act used exactly the same words as are used in the present Act, "persons riotously and tumultuously assembled together." Since the passing of the present Act a felonious demolition is not necessary, but in other respects the essentials of the injury remain the same as before.

Clavell Salter, *K.C.*, and *Cecil Walsh*, for the plaintiffs. The question in this case is whether a building has been injured by persons riotously and tumultuously assembled together. It is not necessary for the plaintiffs to prove so much as would support an indictment for the misdemeanour of a riot at common law. It is not the riot but the injury to property that is the gist of the claim under this statute; it is enough if the injury is done with circumstances of noise, violence, or threats of violence, and public fear. But assuming that in order to sustain a claim under this Act it is necessary to prove all the elements of a riot, there was ample evidence of a riot in this case. It is stated in Stephen's Digest of the Criminal Law, 5th ed. arts. 75 et seq., that an unlawful assembly is an assembly of three or more persons (*a*) with intent to commit a crime by open force, or (*b*) with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it; and that a riot is an unlawful assembly which has actually begun to execute the purpose for which it assembled by a breach of the peace, and to the terror of the public. Hawkins' Pleas of

(1) (1888) 16 Cox, C. C. 420. (2) (1798) 7 T. R. 496.
(3) (1881) 7 Q. B. D. 201.

the Crown, 8th ed. bk. 1, ch. 28, s. 4, vol. 1, p. 513, is really to the same effect. So also is *Clifford* v. *Brandon*. (1)

[BRAY J. The question is whether an intention on the part of three or more persons to defend or assist one another against opposition is essential to a riot.]

The question is rather whether there was any evidence on which the county court judge could find that these youths were riotously and tumultuously assembled together. An intention to defend or assist one another may be necessary to constitute the misdemeanour of a riot at common law, but persons may riotously and tumultuously assemble together for the commission of the injuries mentioned in s. 2 of the Riot (Damages) Act, 1886, without any such intention. [The Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 12, was also referred to.]

Avory, K.C., in reply. The case of *Reg.* v. *Langford* (2) is an authority that in an action under s. 2 of 7 & 8 Geo. 4, c. 31, it is necessary for the plaintiff to prove an intention on the part of the persons riotously and tumultuously assembled to assist one another against any who oppose them. It follows that proof of a similar intention is necessary to establish a cause of action under s. 2 of the Riot (Damages) Act, 1886.

Cur. adv. vult.

July 29. The judgment of the Court (Phillimore and Bray JJ.) was read by

PHILLIMORE J. We have taken time to consider this case. It is an appeal from the decision of his Honour Judge Willis, sitting in the county court at Southwark, giving judgment for the plaintiffs for damages done by the knocking down of a wall. The action was brought under the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), s. 2, upon the footing that the wall was a "building" "destroyed" by "persons riotously and tumultuously assembled together." The learned judge has found that the wall was a "building," and there is no complaint of this finding. It was suggested to us that the learned judge thought that a building might be destroyed by "persons riotously assembled," without

(1) (1810) 2 Campb. 358. (2) (1842) Car. & M. 602.

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there being an actual riot. But we find nothing in his judgment to lead us so to suppose, and he has since told us that he did not intend so to decide. We have, therefore, to consider whether the evidence justifies his finding that there was a riot. It appears that about 9 P.M. on October 30 last, seven or eight youths of ages from fourteen to eighteen were upon the pavement in Martindale Road shouting and using rough language, some of them standing with their backs against the wall, others running against them or against the wall with their hands extended, and that after they had gone backwards and forwards in this way for about a quarter of an hour the wall fell with a "splash." It was a nine-inch wall toothed into a house, of considerable length, and enclosing a yard. About twelve to thirteen feet fell. As soon as it fell the caretaker of the premises came out into the street and the youths cleared off in different directions. There was evidence that the neighbourhood is a rough one, and that doors, windows, shutters, and water and gas fittings have been at other times destroyed, and people frightened. It should be added that the youths were described as "congregated together" and as appearing to be acting together.

These are all the facts; and upon them we have to determine whether the learned judge could properly find that there was a riot. We have been referred to several authorities, and we have consulted them and some others. It is as well to enumerate those we have consulted: Brooke, La Graunde Abridgement, part 2, p. 231, tit. Riots, Routs, and Assemblies; Coke, Inst., part 3, ch. 79, p. 176, Of Riots, Routs, Unlawful Assemblies, Forces, &c.; Blackstone's Commentaries, 13th ed. (1800), by Edward Christian, vol. 4, p. 146; Hawkins' Pleas of the Crown, bk. 1, 7th ed. (1795), by Leach, ch. 65, vol. 2, p. 52; 8th ed. (1824), by Curwood, ch. 28, vol. 1, p. 513, Of Riots, Routs, and Unlawful Assemblies, ss. 1 to 5; Stephen's Digest of the Criminal Law, 5th ed. arts. 75—77; *Rex* v. *Soley* (1); *Reg.* v. *Langford* (2); *Drake* v. *Footitt* (3); *Reg.* v. *Cunninghame Graham* (4); and Russell on Crimes and later textbooks.

(1) (1707) 11 Mod. 100.
(2) Car. & M. 602.
(3) 7 Q. B. D. 201.
(4) 16 Cox, C. C. 420.

Riot is a crime, a misdemeanour at common law. The writer who appears to require the fewest elements to constitute this crime, and who, therefore, is the strongest authority in favour of the plaintiffs, is Lord Coke. He says that riot is where three or more do any unlawful act, as to beat any man, or to hunt in his park, or take possession of another man's land, or cut or destroy his corn, &c. This would seem to imply that any assault or malicious injury to property done by three or more is a riot. It is to be observed, however, that if this is Lord Coke's meaning, he stands alone; also that the whole chapter, which embraces four or five kinds of crime, is short and sketchy, and that his definition of rout is an illogical one, derived, as we see by reference to Brooke, from the reading of Serjeant Marrow in the Inner Temple on the Statute of Peace, a reading very properly criticized by Brooke. Blackstone follows Coke in his definition of rout—a definition which has been since abandoned by text writers, and he nearly follows Coke in his definition of riot; but he makes it plain that there must always be force or violence to constitute a riot. Hawkins requires that the rioters should have an intent mutually to assist one another against anyone who should oppose them in the execution of their enterprise, and should actually execute the same in a violent and turbulent manner to the terror of the people (s. 1). A riot ought to be accompanied, he says, by some offer of violence either to the person of a man or to his possessions, as by beating him or forcing him to quit possession of his land or goods, &c. (s. 4); and there must be at least some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike terror into the people (s. 5). Stephen says that an unlawful assembly must be (1.) with intent to commit a crime by open force, or (2.) with intent to carry out any common purpose in such a manner as to give firm and courageous persons reasonable ground to apprehend a breach of the peace, and a riot is an unlawful assembly which has actually begun to execute its purpose by a breach of the peace and to the terror of the public. In *Rex* v. *Soley* (1) Lord Holt C.J. says: "If I am writing a letter and three or more come hallooing and jogging

(1) 11 Mod. 100.

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me, is this a riot? No; it ought to be in terrorem populi." In *Reg.* v. *Langford* (1), where five persons were indicted for riot for ejecting an old man out of a cottage which they claimed, and then demolishing it, the conviction was supported because such force was used as to terrify the old man. *Drake* v. *Footitt* (2) was the case of a violent election riot, where the only question was whether a felony had been committed. In *Reg.* v. *Cunninghame Graham* (3) Charles J., largely relying upon the passages in Hawkins, instructed the jury that "a riot is a disturbance of the peace by three persons at the least, who, with intent to help one another against any person who opposes them in the execution of some enterprise or other, actually execute that enterprise in a violent and turbulent manner to the alarm of the people."

From these passages we deduce that there are five necessary elements of a riot—(1.) number of persons, three at least; (2.) common purpose; (3.) execution or inception of the common purpose; (4.) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (5.) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. In this case element No. 1 was present. As to elements Nos. 2 and 3, there was evidence upon which the learned judge could have found their existence, though, as far as we can judge from the notes of the evidence and without seeing the witnesses, we think we should not have found the same way. But as to elements Nos. 4 and 5 there is no evidence. The youths ran away as soon as the single caretaker came forward; there is no reason to suppose that they would have resisted if he had come forward earlier and required them to desist. It is true that the caretaker's wife was frightened by the noise of the falling wall, but no one says that he was alarmed by the youths, though the witnesses may have been frightened by other youths on other occasions. Nor was the conduct of the youths such as would be calculated to alarm persons of reasonable firmness and courage.

(1) Car. & M. 602. (2) 7 Q. B. D. 201.
(3) 16 Cox, C. C. 420.

We cannot hold that there was a riot. The appeal must be allowed, and judgment must be entered for the defendant.

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Solicitors for appellant: *Ellis & Ellis.*

Solicitors for respondents: *Huntley & Son.*

W. H. G.

THE KING *v.* THE GOVERNOR OF BRIXTON PRISON. *Ex parte* CALBERLA.

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July 30.

Extradition—Discharge of Criminal—Exemption from Punishment acquired by Lapse of Time—Treaty between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals of May 14, 1872, *arts.* 4, 5.

By art. 4 of the Treaty between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals of May 14, 1872, it is provided that extradition shall not take place if the person claimed has already been tried and discharged.

By art. 5 of the treaty extradition shall not take place if exemption from prosecution or punishment has been acquired by lapse of time according to the laws of the State applied to.

A criminal was by a competent Court in Germany sentenced to a term of imprisonment for several extradition crimes. Before the term had expired he was, under an article of the Criminal Procedure Ordinance of the German Empire, released from custody on account of his health, but with the liability to be called upon subsequently to serve the residue of the term of imprisonment. At a subsequent date, when the term of imprisonment, if it had been served continuously, would have expired, the criminal was called upon by the competent authority in Germany to serve the residue of the term:—

Held, (1.) that he had not been discharged within the meaning of art. 4 of the treaty; and (2.) that exemption from punishment had not been acquired by lapse of time according to the laws of the State applied to within the meaning of art. 5 of the treaty; and that the criminal was liable to be extradited.

RULE nisi calling upon the governor of Brixton Prison to shew cause why a writ of habeas corpus should not issue directing him to have in the King's Bench Division the body of the applicant, one Julius Alexis Calberla, who had been taken and detained in custody under an order for extradition dated June 28, 1907.

On September 22, 1902, the applicant was in the Oldenburg Grand Ducal Provincial Court, in the Empire of Germany, convicted of four several offences, three of which were extradition

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crimes. Of these three offences he was sentenced to two years' imprisonment for the first, two years for the second, and one for the third. For the fourth offence, which was not an extradition crime, he was sentenced to six months' imprisonment. In pursuance of art. 74 of the Penal Code (*Strafgesetzbuch*) of the German Empire, these various sentences were collected into one sentence for a term of four years.

The applicant had already on September 22, 1902, been in prison under a remand for a period of six months, and by the sentence of the Court it was ordered that this period of six months should be deemed to have been imprisonment in pursuance of the sentence. He had therefore practically to serve a term of three years and six months under the sentence. This sentence was confirmed by the judgment of the Supreme Court of Appeal in Germany, and on May 11, 1903, the applicant was sent to prison to serve a term of four years from November 11, 1902.

On or about October 21, 1903, owing to the fact that further imprisonment would have endangered his life, Calberla was transferred in custody to a hospital at Vechta, which was then used for the purpose of keeping in custody prisoners who, owing to the state of their health, could not remain in prison. He remained in custody in the hospital until February 4, 1904.

By an order of the Oldenburg Court dated February 24, 1904, and made under s. 493 of the Criminal Procedure Ordinance (*Strafprozessordnung*) of the German Empire, it was adjudged that the period spent by the applicant in the hospital up to February 4, 1904, should be reckoned in the period of punishment. On the last-named date he had undergone six months and about two hundred and seventy days of the collective sentence of four years, and had over two years' imprisonment still to serve.

By s. 487 of the Criminal Procedure Ordinance the execution of a sentence may in certain cases be postponed or suspended if the further execution thereof gives cause to anticipate imminent danger to the life of the criminal. On February 4, 1904, in pursuance of that section, Calberla was permitted to go at large on the ground that further execution of the sentence caused apprehension of imminent danger to his life. It appears that a release from custody under this section is not an absolute

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discharge, but that the criminal may subsequently be called upon to undergo the residue, if any, of his sentence. He remained in the hospital for one year after being permitted to go at large as aforesaid.

On October 19, 1905, Calberla, the applicant, was by the directions of the State attorney of the Duchy of Oldenburg called upon to enter upon his punishment again on November 1, 1905, or else by that day to forward a certificate of the doctor at the prison at Vechta that a further execution of his sentence would cause apprehension of imminent danger to his life. On his failure to produce any such certificate an order was made on November 7, 1905, by the State attorney that the applicant should enter again upon his punishment at the latest on November 12, 1905. He failed to comply with this order, and on November 15, 1905, the State attorney issued an order that he should be arrested for the purpose of undergoing the remainder of the sentence of four years' imprisonment.

In April, 1907, an application was made to the Bow Street Police Court for his extradition, and an order was made under which Calberla was taken and detained as above stated.

The Treaty between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals, signed at London, May 14, 1872, provides by art. 4, that "the extradition shall not take place if the person claimed on the part of the Government of the United Kingdom, or the person claimed on the part of any of the Governments of the German Empire, has already been tried and discharged or punished, or is still under trial in one of the States of the German Empire, or in the United Kingdom, respectively, for the crime for which his extradition is demanded . . . ."; and by art. 5, that "the extradition shall not take place if, subsequently to the commission of the crime, or the institution of the penal prosecution, or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the State applied to."

W. H. Sands obtained a rule nisi for a writ of habeas corpus on the following, among other, grounds: (1.) that the applicant

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had been lawfully discharged from custody by the German Court; and (2.) that the period of his sentence had expired before the extradition proceedings were instituted.

Sir J. Lawson Walton, A.-G., and *Rowlatt* shewed cause. There are two questions in this case. The first question is what is the meaning of "discharged" in art. 4 of the treaty of 1872. The words in the German version of the treaty are "*ausser Verfolgung gesetzt*," and the expression indicates a final discharge from further prosecution or punishment—not, as in this case, a mere permission to go at large on account of ill-health, with an obligation to return to prison if the criminal's health so far improves that he can serve the residue of the term of his imprisonment without danger to his life.

The second point is that exemption from punishment has been acquired by lapse of time according to the laws of the State applied to for extradition, i.e., the United Kingdom, within the meaning of art. 5 of the treaty. This contention is based on the fallacy of taking the sentence of the German Court as being the sentence of an English Court. An English sentence runs continuously de die in diem from the day on which it is pronounced, and no doubt if this had been an English sentence it would have expired in four years from November 11, 1902, and the criminal could not afterwards be further punished for the crime for which he was sentenced. But that is not the case with this German sentence, which must be taken to be a legal and valid sentence, and one which the German Court was competent to pronounce. By German law a sentence may have an intermittent effect, and a convict may be released temporarily on the terms that he shall return to prison to finish the term of his sentence. The question is not whether such a sentence would be valid by English law, but whether, taking the sentence as it stands, exemption from its operation has been acquired by lapse of time according to the laws of England, which clearly has not happened.

By s. 10 of the Extradition Act, 1870 (33 & 34 Vict. c. 52), in the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of the Act) would, according to the law of England,

prove that the prisoner was convicted of such a crime, the police magistrate shall commit him to prison. By s. 26 of the Act the term "fugitive criminal" means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign State who is in, or is suspected of being in, some part of His Majesty's dominions. Accordingly, if a person convicted of an extradition crime committed within the jurisdiction of the foreign State, Germany in the present case, is found here in England, it is the duty of this Government to surrender him to the German authorities unless he can shew some legal reason to the contrary. The reasons offered in the present case are insufficient.

J. P. Grain and *W. H. Sands*, in support of the rule. First, the applicant was on February 4, 1904, discharged within the meaning of art. 4 of the treaty of 1872 when he was allowed to leave the hospital on account of his health. It is common ground that he had been tried; and therefore, by the terms of that article, the extradition is not to take place.

Secondly, exemption from punishment has been acquired by lapse of time according to the laws of the State applied to for extradition, i.e., the United Kingdom. If this sentence of four years' imprisonment had been pronounced by an English Court it would have expired by lapse of time on November 11, 1906. Therefore, by art. 5 of the treaty, extradition is not to take place after that date. The application for extradition was not made until April, 1907.

LORD ALVERSTONE C.J. The sentence of three and a half years' imprisonment, by reason of the criminal having been in prison for some time, commenced in May, 1903; in October, 1903, he was removed in custody to a hospital, and in February, 1904, he was allowed to go at large on grounds of health. Therefore a considerable portion of the original sentence remains to be served. On November 15, 1905, an order was made that Calberla should be rearrested and should undergo the remainder of the sentence. In these circumstances it is said that, inasmuch as this application for an order for surrender was not made until April, 1907, and as the full term of imprisonment, if it had run continuously,

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would have expired on November 11, 1906, the order cannot now be made. That contention is based upon two articles of the extradition treaty with Germany of 1872. Art. 4 of that treaty provides that the extradition shall not take place if the person claimed on the part of the Government of the United Kingdom, or the person claimed on the part of any of the Governments of the German Empire, has already been tried and discharged or punished. First, it is said that Calberla was discharged in February, 1904, and cannot, therefore, be extradited under that article.

Whatever may be the correct translation of the operative words in the order of the German Court permitting the prisoner to go at large on account of his health, it seems clear that those words did not operate to discharge him from punishment in the sense that he was no longer amenable to punishment; and in my opinion art. 4 cannot refer to the case of a man who has been released from custody according to German law upon the terms that he shall come back again to complete his sentence. We must accept the order made by a competent Court that he is to go back for that purpose, and therefore hold that there is no evidence of a discharge within the meaning of art. 4 of the treaty.

Then art. 5 was relied on. That article provides that the extradition shall not take place if, subsequently to the commission of the crime, or the institution of the penal prosecution, or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time according to the laws of the State applied to. It is contended that the sentence would have expired, according to our law, on November 11, 1906, and that therefore this man ought not to be extradited.

The idea underlying art. 5 seems to be the application of principles of international justice, and that idea is realized by providing that where the State applied to would not, according to its laws, allow the criminal to be punished, or further punished, owing to lapse of time, he shall not be punished, or further punished, by the State applying for his extradition. I have had some doubt whether, inasmuch as by our law punishment runs continuously from the date of the sentence, it might not be said

that at the expiration of four years from November 11, 1902, exemption from punishment had in this case been acquired by lapse of time on November 11, 1906. But I think that art. 5 had in view the fact that Germany has certain prescribed limits of time within which alone an offender may be punished after the date of the offence. It is an article framed with a view to the laws of the State applied to, where that State by its laws puts a limit upon the time within which a prosecution may be instituted or punishment inflicted. According to our system of procedure, with one exception, the whole term of the punishment for a crime must be served continuously from the date of the sentence; it does not allow us to execute a punishment or to keep a man in confinement after the expiration of that term, and, subject only to the statutes which allow a release on ticket of leave, punishment cannot be inflicted for the crime for which sentence has been passed after that term has expired. If a man, having obtained a ticket of leave, commits an offence, the original punishment must be completed; but, apart from special instances arising under certain statutes, an English sentence cannot be broken in upon, and can only be carried out within the time specified in the sentence. Does that fact constitute an exemption from punishment acquired by lapse of time according to the laws of England? In my opinion it does not. We have here to deal with a German sentence, which differs in these points from an English sentence. In Germany a man may be allowed to leave prison on the ground of ill-health, with the obligation to return to custody and serve the rest of his term of imprisonment when his health permits; and under that law the order was made that this man should go back to prison and serve the rest of his sentence. It seems to me that there is nothing to exempt the applicant from punishment according to our law, and this rule must therefore be discharged.

DARLING J. I am of the same opinion, and, except upon the meaning of art. 5, I do not desire to add anything to what my Lord has said. With regard to art. 5, I was for some time impressed by Mr. Grain's argument, but I am now satisfied that it ought not to prevail. In my view there is in this case no

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lapse of time giving exemption from punishment according to the laws of England, because our laws have for this purpose no application to the form of intermittent punishment which is in question here. The system which prevails in Germany has no parallel in this country.

PHILLIMORE J. I agree, and have nothing to add.

Rule discharged.

Solicitor for applicant: *Herbert Oppenheimer.*
Solicitor for the Crown: *The Director of Public Prosecutions.*

W. H. G.

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July 17, 31.

In re ATTREE.

Ex parte WARD.

Bankruptcy—Proof of Debt by Money-lender—Withdrawal of Proof—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-s.* 3—*Jurisdiction of Bankruptcy Court to grant Relief under.*

A bankrupt was indebted to a money-lender for money lent, the money-lender holding a security for the debt. The creditor lodged a proof in the bankruptcy for the debt stating the amount at which he valued the security. The proof was not made use of in voting at any meeting of creditors. The trustee having required the creditor to give up the security under Sched. I., r. 12, of the Bankruptcy Act, 1883, he gave notice of withdrawal of the proof and of intention to correct the valuation by a new proof. The trustee then moved the bankruptcy Court for an order for an account, and for relief under the Money-lenders Act, 1900 :—

Held, that the jurisdiction of the bankruptcy Court to exercise the powers of the Money-lenders Act arises only under s. 1, sub-s. 3, of that Act, and is confined to cases in which there is an application before the Court relating to the admission or amount of a proof by a money-lender; that, as the proof had not been used either for purposes of voting or of claiming a dividend, the creditor was at liberty to withdraw it without the consent either of the trustee or of the Court; and that, as there was consequently no proof by the money-lender before the Court, it had no jurisdiction to entertain the motion.

APPEAL from Brighton County Court.

During the years 1904 and 1905 G. F. Attree had borrowed

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various sums of money from one H. T. Pockett, a money-lender carrying on business under the name of Chesney, and had deposited with Pockett as security for the advances a certificate for 100 shares in a company called Attree & Kent, Limited. On October 15, 1906, G. F. Attree was adjudicated a bankrupt on the petition of a creditor. On October 26 Pockett lodged a proof in the bankruptcy for 1250*l.* in respect of a promissory note for that amount given to him by the debtor for money lent, and at the same time he stated that he valued the shares in Attree & Kent, Limited, held by him as security at 100*l.* On October 29, at the first meeting of creditors, Pockett's solicitor attended with his proxy to vote for the appointment of a trustee. Pockett's proof was admitted for voting purposes at 1150*l.*, but, as the person whom he desired to be appointed trustee was not generally supported by the creditors, his proxy did not exercise his right to vote. A Mr. Ward was appointed trustee. On November 5 Pockett's solicitors wrote to the trustee stating that their client intended to reassess and revalue the security held by him. On November 7 the trustee wrote to Pockett demanding, under Sched. I., r. 12, of the Bankruptcy Act, 1883, surrender of the security upon payment to him of the value as estimated in the proof, with the addition of 20 per cent. On November 29 Pockett wrote to the trustee withdrawing his proof and stating his intention of lodging another. On January 22, 1907, the trustee gave notice of his intention to move the Brighton County Court, sitting in bankruptcy, for an order that Pockett should deliver up the share certificate held by him, and that an account should be taken of the several loan transactions between him and the debtor in accordance with the Money-lenders Act, 1900. On February 9 Pockett served the trustee with notice of motion for leave to amend his proof and his valuation of the security. On March 1 both motions came on for hearing. It was contended on behalf of Pockett in answer to the trustee's application that the Court had no jurisdiction to entertain it, as the proof had been withdrawn, and that the powers given by the Money-lenders Act, 1900, could be exercised by a bankruptcy Court only where there was a proof before the Court to be dealt with. The county court judge upheld that

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contention and dismissed the trustee's application, whereupon Pockett abandoned his cross-motion, which was also dismissed.

The trustee appealed.

C. A. Russell, K.C., and *Poyser*, for the appellant. Assuming that s. 1, sub-s. 3, is the only provision under which a Court sitting in bankruptcy has jurisdiction to exercise the powers of the Money-lenders Act, it applies to the present case. The motion of the trustee was an "application relating to the . . . . amount of a proof by a money-lender." The creditor having once lodged his proof cannot withdraw it without the leave either of the Court or of the trustee. As Pockett had not obtained such leave, the withdrawal of his proof was a nullity. The respondent will rely upon a dictum of Cave J. in *In re Deerhurst, Ex parte Seaton* (1), where he says: "There is no doubt that a creditor may withdraw his proof before it has been adjudicated on. If he desires not to prove at all, or if he desires to amend his proof, he may before it is adjudicated upon withdraw the proof and tender another." But he did not by that mean that the creditor could do so without the leave of the Court. No doubt the authorities shew that the Court ought to give leave to withdraw a proof where the creditor wishes to withdraw altogether from the bankruptcy. But it is otherwise where he wishes to withdraw the proof conditionally with the view of retendering it with an amended valuation: *In re Mateo Clark.* (2) In such a case the Court will exercise their discretion. Rule 13 of Sched. II. of the Bankruptcy Act, 1883, provides that, "Where a creditor has so valued his security, he may at any time amend the valuation and proof on shewing to the satisfaction of the trustee, or the Court, that the valuation and proof were made bona fide on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment without application to the Court." A creditor cannot evade the express provisions of that rule as to amendment by simply saying that he will withdraw the proof

(1) (1891) 8 Morr. 258, at p. 262. (2) [1901] 1 K. B. 655.

without prejudice to his right to lodge another. When once a creditor has valued his security for voting purposes he has done it for all purposes. Secondly, the jurisdiction of the bankruptcy Court to apply the relief given by the Money-lenders Act is not confined to cases falling within s. 1, sub-s. 3. By sub-s. 2 the powers of the Act may be exercised by "any Court in which proceedings might be taken for the recovery of money lent by a money-lender." That includes a bankruptcy Court—for bankruptcy proceedings are a mode of enforcing execution of a judgment. That this is so appears from *In re a Debtor* (1), where it was held that the Court had jurisdiction to give relief under the Money-lenders Act on the hearing of a bankruptcy petition presented by a money-lender and founded upon a judgment debt for money lent and non-compliance with a bankruptcy notice. In that case there was no "application relating to the admission or amount of a proof," for the debtor had not been adjudicated. The reason why sub-s. 3 was necessary was that a proof might be put in for voting purposes only, and not for purposes of a claim to dividend, in which case the proof would not come within the expression "proceeding for the recovery of money lent." Thirdly, the bankruptcy Court had jurisdiction to order the account which was asked for wholly apart from the Money-lenders Act. It is provided no doubt by s. 102, sub-s. 1, of the Bankruptcy Act, 1883, that the jurisdiction thereby given to bankruptcy Courts to decide all questions incidentally arising in the course of bankruptcy proceedings "shall not be exercised by the county court for the purpose of adjudicating upon any claim not arising out of the bankruptcy which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding assent thereto, or the money, money's worth, or right in dispute does not, in the opinion of the judge, exceed in value 200*l.*" But here the matter in question did arise out of the bankruptcy. Pockett admitted that he held the certificate only as security. If, therefore, its value exceeded the amount of the debt, he would be liable for the value, and it was consequently necessary to take an account.

Shearman, K.C., and *Tindale Davis*, for the respondent. The county court had no jurisdiction to entertain the trustee's

(1) [1903] 1 K. B. 705.

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application, unless that jurisdiction was given by sub-s. 3. Sub-s. 2 only applies to a Court "in which proceedings might be taken for the recovery of money lent." But a Court sitting in bankruptcy is not such a Court. The case of *In re a Debtor* (1) does not support the trustee's contention. There all that the Court decided was that they could go behind the judgment, for which purpose it was not necessary to resort to the provisions of the Money-lenders Act. With regard to sub-s. 3, it is to be observed that that sub-section probably applies only to applications by the creditor who is aggrieved by some action on the part of the trustee. But, assuming that it does also apply to applications by the trustee, still there was no application before the Court relating to the admission or amount of a proof. The creditor had withdrawn his proof, as he was perfectly entitled to do. Sched. I. of the Bankruptcy Act, 1883, which deals with the meetings of creditors, provides by r. 12 that "It shall be competent to the trustee or to the official receiver, within twenty-eight days after a proof estimating the value of a security as aforesaid has been made use of in voting at any meeting, to require the creditor to give up the security for the benefit of the creditors generally on payment of the value so estimated, with an addition thereto of twenty per centum. Provided, that where a creditor has put a value on such security, he may, at any time before he has been required to give up such security as aforesaid, correct such valuation by a new proof, and deduct such new value from his debt, but in that case such addition of twenty per centum shall not be made if the trustee requires the security to be given up." There is not a word in that rule suggesting that the right of withdrawing the proof and tendering a new one is subject to the leave of the Court. The only limitation upon his absolute right to do so is that he must do it before he has been required to give up his security. The dictum of Cave J. in *In re Deerhurst* (2), to the effect that the creditor may at any time before it has been adjudicated upon withdraw his proof and tender another, was adopted by Wright J. in *In re Rhoades*. (3) Rule 13 of Sched. II., on which the trustee

(1) [1903] 1 K. B. 705. (2) 8 Morr. 258, at p. 262.
(3) [1899] 1 Q. B. 905.

relies, has no application to the present case. That schedule deals with the proof of debts, not for voting purposes, but for purposes of dividend; and r. 13 specifies the conditions on which he may amend his valuation after his proof has been adjudicated upon and he has claimed a dividend. But here the creditor is not claiming any dividend upon the proof originally lodged. Scheds. I. and II. deal with different subject-matters, and are wholly independent.

Cur. adv. vult.

July 29. The judgment of the Court (Bigham and Sutton JJ.) was read by

BIGHAM J. This was a motion by way of appeal from the judgment of the county court judge of Brighton dismissing the application of the trustee to have the proof of one H. T. Pockett, a money-lender, dealt with in accordance with the provisions of the Money-lenders Act, 1900, and the substantial question is whether, in the circumstances of the case, the county court judge had jurisdiction to act. The facts are as follows: One Pockett is a money-lender trading under the name of Gerald Chesney. He had had certain money-lending transactions with the bankrupt, in the course of which the bankrupt had deposited with him, by way of security, 100 shares of 10*l.* each in a company called Attree & Kent, Limited. A receiving order was made against the bankrupt on October 15, 1906. On October 26, 1906, Pockett lodged a proof of debt for 1250*l.* for money lent, in which he referred to the 100 shares as part of his security, and valued them at 100*l.* At the first meeting of creditors, which was held on October 29, 1906, Pockett was represented by a solicitor named Leader, who held his proxy. The proof was admitted for voting purposes, but Leader did not vote upon it, and alleged that it would probably need amendment by a revaluation of the security. On November 5, 1906, Leader wrote to the trustee that his client Pockett intended to revalue the security. On November 7, 1906, the trustee wrote requiring Pockett, pursuant to r. 12 of the First Schedule to the Bankruptcy Act, 1883, to give up the security, and intimated that he was prepared to pay the estimated value (100*l.*), with an

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addition of 20 per cent., in accordance with the provisions of the rule. On November 29 Leader wrote to the trustee a letter giving notice that he withdrew the proof and intended to lodge another, and thereupon the trustee marked the proof in red ink "Withdrawn by letter of Leader, dated November 29, 1906." Two notices of motion were then filed, one by the trustee, dated January 22, 1907, and the other by Pockett, dated February 9, 1907. The trustee's notice of motion was for an order that Pockett should deliver up the share certificate, or in the alternative that he should deliver it up on payment of 120*l.*, being the amount at which the security had been valued in the proof of October 26, 1906, plus 20 per cent., and for an order that an account should be taken in accordance with the Money-lenders Act, 1900, of the money-lending transactions between Pockett and the bankrupt, and for other consequential relief, "although you, the said Pockett, without the leave or authority of the trustee or the Court, have purported to withdraw your proof." Pockett's notice of motion was for an order that he should be at liberty to amend his proof, "sworn and filed herein," and to amend the valuation of the security set out in his proof on the ground of a mistaken estimate. Both these motions were fixed to come on before the learned county court judge on March 1, 1907, the trustee's motion being first in order. Evidence was called on the part of the trustee for the purpose of shewing that the transactions between Pockett and the bankrupt came within the meaning of the Money-lenders Act, 1900, and the witnesses were cross-examined on behalf of Pockett. At the close of the trustee's case the point was taken by counsel for Pockett that no order could be made, inasmuch as there was no proof before the Court to be dealt with. The learned county court judge took this view, and dismissed the trustee's application with costs. I think the county court judge was right. The only provision of the Money-lenders Act, 1900, which purports to give any jurisdiction to the Court of bankruptcy is the 3rd sub-section of s. 1, which is in these words: "On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the Court may exercise the like powers as may be exercised under this section when proceedings are

taken for the recovery of money"; and the question is whether it can be said that there was in fact any application relating either to the admission or to the amount of a proof within the meaning of this enactment so as to give the Court jurisdiction. It was contended that there was, and that the so-called withdrawal of the proof by the creditor was ineffective. It was said that the lodging of the proof in the circumstances already mentioned created rights in favour of the trustee in connection with the security, and that, therefore, it was not competent to the creditor to withdraw the proof. This is, in my opinion, a mistaken contention. The First Schedule to the Act of 1883 deals with "meetings of creditors," and provides (r. 8) that before voting at the first meeting a creditor shall make and lodge with the official receiver a proof of his debt; it further provides (r. 10) that, for the purpose of voting, a secured creditor shall in his proof state the value at which he assesses his security, and shall vote only in respect of the amount of his debt after deducting that assessed value, and that if he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the Court, on application, is satisfied that the omission to value the security has arisen from inadvertence. Rule 12 of the schedule gives the official receiver a right, which he may exercise within twenty-eight days after the proof has been made use of in voting, to require the creditor to give up his security on payment of the estimated value, with an addition of 20 per cent. Then the Second Schedule deals with the "proof of debts"—that is to say, with the mode and form of proof; and in rr. 9 to 16 it deals in particular with the proof of the debts of secured creditors. Rule 11 directs that before ranking for dividend a secured creditor shall state in his proof the value at which he assesses his security, and shall be entitled to receive a dividend only in respect of the balance of his debt after deducting that value. Then Rules 12 and 13 state that when a security is so valued the trustee may at any time redeem it on payment to the creditor of the assessed value, but that where it is shewn a creditor has made a bona fide mistake in estimating his security he may be allowed to amend his estimate. These schedules treat of two different matters, namely, proof of debt for voting purposes and proof of

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debt for dividend purposes, and they define the rights of the official receiver or the trustee, as the case may be, with respect to the security in the event of a secured creditor making use of his proof in voting or valuing his security for dividend purposes. The rules vest no rights in the official receiver or in the trustee in cases where the proof has been merely lodged for voting purposes and has never been made use of either for voting or for claiming a dividend. The proof in such cases is not adjudicated upon, and I agree with the dictum of Cave J. in *In re Deerhurst* (1) that a creditor may in such circumstances withdraw his proof altogether. The withdrawal prejudices no one, and when withdrawn it is as if no proof had ever been made. It was said, however, that the existence on the file of the respondent's cross-notice of motion for an order "to amend his proof" estopped him from saying that there was no application relating to the admission or amount of a proof by a money-lender before the Court within s. 1, sub-s. 3, of the Money-lenders Act. But when this cross-motion was called on, as it was immediately after the trustee's motion had been dismissed, Pockett's counsel abandoned it. This he was certainly entitled to do, and it thereupon stood dismissed with costs. In my opinion the presence of this notice of motion on the file could not be called in aid by the trustee in order to found a jurisdiction for the hearing of his (the trustee's) motion, which otherwise would not exist. The creditor's notice of motion was no more than an intimation of an intention to apply. It was in no sense an application, and the intention could be abandoned (as in this case it was) at any moment. For these reasons I think that the withdrawal by the creditor of his proof was valid, and that the effect of the withdrawal was to deprive the Court of the jurisdiction given to it by sub-s. 3 of s. 1 of the Money-lenders Act. It was finally contended that the Court had jurisdiction notwithstanding the limitation to be found in the Act of Parliament, and in support of this contention reference was made to the case of *In re a Debtor.* (2) That was a case in which the debtor had submitted to a judgment in a money-lender's action. The money-lender then presented a petition founded on non-payment

(1) 8 Morr. 258, at p. 262. (2) [1903] 1 K. B. 705.

of the judgment debt, and the Court directed the registrar to open up the accounts in order to see whether a sufficient petitioning creditor's debt was in reality payable. This direction, however, was not given under the powers of the Money-lenders Act at all, but was given under the well-settled power of this Court to go behind any judgment which may have been signed against a debtor. The case has, therefore, no bearing on the point now before us. Of course, our decision leaves it open to the trustee to pursue his remedies in the ordinary Courts of law. We say no more than that, in the circumstances of this case, the county court judge sitting in bankruptcy was right in holding that he had no jurisdiction to grant to the trustee the relief asked for. The appeal will be dismissed, with costs.

Appeal dismissed.

Solicitors for appellant: *Clarke, Calkin & Son, for Howlett & Clarke, Brighton.*

Solicitors for respondent: *Plunkett & Leader.*

J. F C.

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THE KING *v.* CARSON ROBERTS.

April 29, 30. *Local Government—Auditor—Certiorari—Right of Court to review Surcharge—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 247, *sub-s.* 8—*Poor Law Amendment Act*, 1844 (7 & 8 *Vict. c.* 101), *s.* 35.

On an application for a certiorari under s. 247, sub-s. 8, of the Public Health Act, 1875, to remove a disallowance and surcharge by an auditor, the Court has power to deal with the merits, and is not confined to the question of jurisdiction.

Reg. v. *Haslehurst*, (1887) 51 J. P. 645, followed.

Rules nisi for writs of certiorari to quash certain surcharges made by a district auditor of the Local Government Board on members of the finance committee and the highways committee of the Westminster City Council, and also on the engineer.

The auditor was appointed in March, 1901, by the Local Government Board to audit the accounts of the twenty-eight metropolitan boroughs under the London Government Act, 1899, and on October 15, 1906, he opened an audit of the accounts of the council of the city of Westminster and of the committees and officers of the council for the year April 1, 1905, to March 31, 1906, and in the course of the audit made the surcharges in question. (1)

(1) By s. 35 of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101):—

"If any person aggrieved by any allowance, disallowance, or surcharge by any such auditor require such auditor to state the reasons for the said allowance, disallowance, or surcharge, the auditor shall state such reasons in writing in the book of account in which the allowance, disallowance, or surcharge may be made; and it shall be lawful for every person aggrieved by such allowance, and for every person aggrieved by such disallowance or surcharge, if such last-mentioned person have first paid or delivered over to any person authorized to receive the same all such money, goods, and chattels as are admitted by his account to be due from him or remaining in his hands, to apply to the Court of Queen's Bench for a writ of certiorari to remove into the said Court the said allowance, disallowance, or surcharge, in the like manner and subject to the like conditions as are provided in respect of persons suing forth writs of certiorari for the removal of orders of justices of the peace, except that the condition of such recognizance shall be, to prosecute such certiorari, at the costs and charges of such person, without any wilful or affected delay, and if such allowance, disallowance, or surcharge be confirmed, to pay to such auditor or his successor, within one month after the same may be

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Lord Robert Cecil, K.C. (*Weigall* with him), shewed cause against the rules. If there is any evidence on which the auditor

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confirmed, his full costs and charges, to be taxed according to the course of the said Court, and except that the notice of the intended application, which shall contain a statement of the matter complained of, shall be given to such auditor or his successor, who shall in return to such writ return a copy under his hand of the entry or entries in such book of account to which such notice shall refer, and shall appear before the said Court, and defend the allowance, disallowance, or surcharge so impeached in the said Court, and shall be reimbursed all such costs and charges as he may incur in such defence out of the poor rates of the union or parish respectively interested in the decision of the question, unless the said Court make any order to the contrary; and that on the removal of such allowance, disallowance, or surcharge the said Court shall decide the particular matter of complaint set forth in such statement, and no other; and if it appear to such Court that the decision of the said auditor was erroneous, they shall, by rule of the Court, order such sum of money as may have been improperly allowed, disallowed, or surcharged to be paid to the party entitled thereto by the party who ought to repay or discharge the same; and they may also, if they see fit, by rule of the Court, order the costs of the person prosecuting such certiorari to be paid by the parish or union to which such accounts relate, as to such Court may seem fit; which rules of Court respectively shall be enforced in like manner as other rules of the said Court are enforceable."

By s. 247 of the Public Health Act, 1875 (38 & 39 Vict. c. 55):—

"(7.) Any auditor acting in pursuance of this section shall disallow every item of account contrary to law, and surcharge the same on the person making or authorizing the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person, or of any sum which ought to have been but is not brought into account by that person, and shall in every such case certify the amount due from such person, and on application by any party aggrieved shall state in writing the reasons for his decision in respect of such disallowance or surcharge, and also of any allowance which he may have made:

"(8.) Any person aggrieved by disallowance made may apply to the Court of Queen's Bench for a writ of certiorari to remove the disallowance into the said Court, in the same manner and subject to the same conditions as are provided in the case of disallowances by auditors under the laws for the time being in force with regard to the relief of the poor; and the said Court shall have the same powers with respect to allowances disallowances and surcharges under this Act as it has with respect to disallowances or allowances by the said auditors; or in lieu of such application any person so aggrieved may appeal to the Local Government Board, which Board shall have the same powers in the case of the appeal as it possesses in the case of appeals against allowances disallowances and surcharges by the said poor law auditors:"

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could act, the Court cannot review his decision. The Court is exactly in the same position as on an application for a certiorari to bring up and quash an order of justices. The auditor's discretion is subject to an appeal to the Local Government Board. Sub-s. 8 of s. 247 of the Public Health Act, 1875, which allows any person aggrieved to apply to the Court for a writ of certiorari, gives the Court the same powers that it has with respect to disallowances or allowances by auditors under the laws for the time being in force with regard to the relief of the poor. Those powers are given by s. 35 of the Poor Law Amendment Act, 1844, and are by that section subject to the like conditions as are provided in respect of persons suing forth writs of certiorari for the removal of orders of justices of the peace. In such cases, if the justices had jurisdiction, the Court will not inquire into their decision on the facts: *Reg.* v. *Bolton* (1); *In re William Baker* (2); *Reg.* v. *Knott* (3); *Colonial Bank of Australasia* v. *Willan.* (4)

Sir R. B. Finlay, K.C. (*W. Ryde* with him), in support of the rule. The Court has power to review the discretion of the auditor on such an application as this. By s. 35 of the Poor Law Amendment Act, 1841, it is provided that if it appear to such Court that the decision of the auditor was "erroneous," they shall have power to direct the sum surcharged to be repaid. "Erroneous" must mean erroneous in any sense, whether in fact or in law, and it has been decided in *Reg.* v. *Haslehurst* (5) that the Court has power under the section to review the decision of the auditor on the facts.

[The merits of the case were also fully argued, but, as they turned on questions of fact, it is thought unnecessary to set out the argument and judgments on this point.]

LORD ALVERSTONE C.J. These are four rules which were moved to bring up and quash certain surcharges of the auditor, Mr. Roberts, who audited the accounts of the Westminster City Council. They all raise the same question as to whether or not the auditor was right in the view he took that there

(1) (1841) 1 Q. B. 66.
(2) (1857) 2 H. & N. 219.
(3) (1866) 15 L. T. (N.S.) 291.
(4) (1874) L. R. 5 P. C. 417.
(5) 51 J. P. 645.

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was misconduct or negligence because certain tenders had been accepted by the council. It is necessary, first, to consider exactly what the jurisdiction of this Court is, because it has been contended that our powers are more limited than I am disposed to hold they are. The matter arises under the provisions of s. 247 of the Public Health Act, 1875, which contains a number of sub-sections dealing with the rights and duties of the auditor to examine the accounts and to see the books, and giving him very large powers of inspection and of requiring production of documents. Sub-s. 8 of that section gives us jurisdiction in the matter. [His Lordship read the sub-section.] Now, the proceedings under that sub-section refer us back to the powers for dealing with such matters on appeals from surcharges or disallowances by poor law auditors. That refers us, so far as the Court of King's Bench is concerned, to s. 35 of the Poor Law Amendment Act, 1844. In substance that section provides that if any person aggrieved require the auditor to state his reasons for a surcharge, the auditor shall state them in writing in the book of account in which the surcharge may be made, and it shall be lawful for every person aggrieved by such surcharge, if such person have first paid or delivered over to any person authorized to receive the same, all such money, goods, and chattels as are admitted by his account to be due from him or remaining in his hands, to apply to the Court of King's Bench for a writ of certiorari to remove into the Court the surcharge "in the like manner and subject to the like conditions as are provided in respect of persons suing forth writs of certiorari for the removal of orders of justices of the peace," except that the condition of the recognizance is varied. If the section had stopped there, there would have been a good deal to be said for the contention that all we could do would be to see whether there was evidence before the auditor of the facts found by him and then say whether the certiorari ought or ought not to go according as there was or was not evidence. But the section proceeds to provide for a statement of the matter complained of being given to the auditor, who must in return to the writ return a copy of the entry and appear before the Court and defend the surcharge. I call attention to those words, because, in one sense, it is a great deal more

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than is required in the case of magistrates. The magistrates undoubtedly can come before the Court if there is an application, for instance, for a case to be stated, and shew that there was evidence before them of the facts they have found; but they can scarcely be said to defend the matter in the same sense in which these words are used. The auditor may come and defend the surcharge so impeached, and he is to be reimbursed all such costs and charges as he may incur in such defence out of the poor rates, unless the Court make an order to the contrary. In my opinion it is not too much to say that that puts the auditor in the position of a respondent with the power, right, and privilege of having his costs paid out of the rates unless the Court thinks he has so conducted himself that that ought not to be done. On the removal by certiorari of such a surcharge the Court is to decide the particular matter of complaint set forth in such statement, and no other, and if it appear to the Court that the decision of the auditor was erroneous, they are to order such sum of money as may have been improperly surcharged to be paid to the party entitled thereto. They may also order the costs of the person prosecuting the certiorari to be paid by the parish or union to which such accounts relate. It seems to me that that section in terms gives to this Court, and was intended to give to this Court, a wider jurisdiction than in the ordinary case of a certiorari. It speaks of the decision of the auditor being "erroneous" in general terms, and says that the Court may order such sum of money as may have been improperly surcharged to be paid to the party entitled thereto. Now, reading that section by itself without the light of anything which has already been decided, I should come to the conclusion that it was intended to give to this Court the right of dealing with the matter upon the merits both in law and in fact. But it has been contended that sub-s. 8 of s. 247 of the Public Health Act, 1875, only intended to give this Court the same power to grant a writ of certiorari that it has in the case of orders by justices, and in support of this reliance was placed on *Reg.* v. *Bolton* (1), and it was pointed out that the sub-section gives in the alternative an appeal to the Local Government Board. By s. 4 of the Poor Law

(1) 1 Q. B. 66.

Audit Act, 1848 (11 & 12 Vict. c. 91), to which we are referred by the words at the end of sub-s. 8 of s. 247 of the Public Health Act, 1875, "which Board shall have the same powers in the case of the appeal as it possesses in the cases of appeals against allowances, disallowances, and surcharges by the said poor law auditors," it is provided: "Where any appeal shall be made to the said Commissioners . . . . it shall be lawful for the said Commissioners to decide the same according to the merits of the case." I call attention to the fact that that is an appeal on the merits in lieu of the previous appeal to this Court; and it is at any rate more consistent in my view that this appeal upon the merits is given in lieu of the appeal which is, if I have rightly construed the section, given to the Court of King's Bench than to hold that the appeal to the Local Government Board is the only appeal upon the merits. Then the section goes on to say that if they find that any disallowance or surcharge shall have been or shall be lawfully made, but that the subject-matter thereof was incurred under such circumstances as make it fair and equitable that the disallowance or surcharge should be remitted, they may, by an order under their seal, direct that the same shall be remitted. I cannot read s. 247, sub-s. 8, of the Public Health Act, 1875, referring to the two different jurisdictions given by the earlier Acts, as indicating that this Court has the narrow powers only for which Lord Robert Cecil has contended. I cannot hold that if the auditor has gone wrong on the facts, this Court can only say that there was evidence before him and leave the party to go, if he chooses, to the Local Government Board. It would be rendering practically nugatory the clear language of the section, and I hold that the Court has a right of investigating the matter and hearing the auditor defend his position and deciding on the merits both of law and of fact. The case of *Reg.* v. *Haslehurst* (1) is a clear authority for this view. Cave J. says: "The language is absolute, so that this Court can review his decision not only when erroneous in point of law, but erroneous in any sense." We are bound by that decision, and this is a case, of course, which can go further if necessary. Agreeing, as that decision does, with my view of the section, it

(1) 51 J. P. 645.

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not only binds me, but I think I should have to come to the same conclusion. [His Lordship then discussed the question on the merits, and came to the conclusion that the surcharges of the auditor were not justified.]

DARLING J. concurred.

PHILLIMORE J. I agree that the appeal is an appeal on fact and on law; that, though the mode of procedure is by certiorari, the principles which are applied by this Court when issuing rules of certiorari to quash convictions by magistrates do not apply to the certiorari in this case; and that the appeal in this case to this Court is as wide as it is to the Local Government Board, with one exception, that the Local Government Board may decide that the surcharge has been properly made, and yet in mercy deliver the members of the council from paying. I agree that the decision in *Reg.* v. *Haslehurst* (1) is a decision which this Court ought to follow, and I follow it, not only because it is an authority, but because it commends itself to my judgment.

Rules absolute.

Solicitors: *Last & Sons; Allen & Son.*

(1) 51 J P. 645.

A. P. P. K.

ATTORNEY-GENERAL *v.* JOHNSON.

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July 17, 31.

Revenue—Succession Duty—Estate Duty—Property situate Abroad—English Will—Trust for Conversion—Liability to Duty.

A testator, domiciled in England, by his will left the residue of his real and personal estate, including a tea estate situate in Assam, to trustees in trust to convert it into money and invest the proceeds, and out of the income thereof to pay certain life annuities, and subject thereto and until the death of the last surviving annuitant to pay the surplus income to certain persons in equal shares and to the survivors or survivor of them. The will contained no gift over either of the income or of the corpus upon the death either of the last surviving annuitant or of the last surviving person entitled to the surplus income. The trustees were authorized by the will to work the tea estate until it was sold, and also to postpone the sale and conversion of any part of the estate as long as they might think it desirable, and it was thereby provided that in the meantime the annual produce of the unconverted part should be applied in the same manner as if it were income arising from the proceeds of conversion. The trustees were resident in England, and the will was proved in England. The trustees, in the exercise of their discretion, postponed the sale of the tea estate, and while it still remained unsold two of the persons entitled to shares of the surplus income died:—

Held, that the amount by which the survivors' shares of the surplus income was increased upon the deaths of the said two persons was not, even so far as that increase was attributable to the profits of the tea estate, property situate out of the United Kingdom, and that succession duty, estate duty, and settlement estate duty were payable in respect of the increase so attributable to the tea estate.

Information by the Attorney-General.

Joseph Edward Todd died domiciled in England on May 16, 1896, being at the time of his death entitled to a certain tea estate called the Meleng estate, situate in Upper Assam, and to the machinery, plant and other chattels belonging thereto. By his will dated October 1, 1895, he appointed Henry James Reeves and Charles Holroyd to be his executors and trustees, and after bequeathing certain legacies he dealt with the residue in the following terms:—

Clause 5: "I give devise and bequeath all the rest residue and remainder of my real and personal estate whatsoever and wheresoever and of what nature and kind soever (including my Meleng estate in Upper Assam India and all property machinery plant and other things belonging to me in

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Upper Assam) unto my trustees upon trust to sell the said residuary estate and to collect and get in and convert into money such parts of my residuary personal estate as shall not consist of money (but with power at their discretion to allow any moneys which may have been invested by me prior to my decease in securities for money to remain invested in such securities) and thereout in the first place to pay the legacies given by this my will or any codicil hereto and to invest in their joint names the residue of the net moneys coming to their hands in any of the stocks funds or securities hereinafter particularly mentioned (with power from time to time at their discretion to vary all or any of such securities) and my trustees shall stand possessed of the said residuary estate and the investments thereof upon and for the trusts intents and purposes following that is to say As to the annual income arising therefrom to pay thereout the following annuities"—then followed a list of life annuities amounting in the aggregate to 1500*l.* per annum, including an annuity of 100*l.* a year to Marie Gräf for her life—"And in the event of the annual income to arise from my said residuary estate and the investments thereof exceeding the amount of the annuities hereinbefore bequeathed I direct that down to and until the death of the last survivor of the several annuitants hereinbefore named the balance of the said annual income shall be paid to the said John George Todd, Florrie Todd, Edouard Todd, George Todd junior, Georgette Todd, Gabrielle Todd, and Marie Gräf and Henry James Reeves, or the survivor or survivors of them in equal shares."

Clause 6: "I authorize my trustees until the sale of my Meleng estate in Upper Assam as hereinbefore directed to carry on the trade or business of a tea planter now carried on by me on the said estate and for that purpose to retain and employ therein the capital which shall at my death be employed therein and such additional capital as they shall think fit to advance from time to time out of my residuary estate, with power to employ at such salary as they shall think fit any manager of the said business and generally to act in all matters relating to the said business as if they were beneficially entitled thereto and also power to delegate all or any of the powers vested in them in

relation to the said business to any persons or person whom they may think fit and my trustees shall be free from all responsibility and be fully indemnified out of my estate in respect of any loss arising in relation to the said business."

Clause 7: "My trustees may postpone the sale and conversion of any part of my estate for so long as they may think desirable and in the meantime I declare that the net annual produce arising from the unconverted part of my estate whether real or personal and whether of a permanent or a leasehold or wasting character including the net profit derived from the carrying on of the said business shall be applied in the same manner as if the same were income arising from the proceeds of the conversion of my estate."

Estate duty was paid in respect of the personal estate of the testator and settlement estate duty was paid in respect of the residue of the said personal estate.

Henry James Reeves died on November 12, 1903, and Marie Gräf died on December 27, 1905. The sale of the Meleng estate was postponed by the trustees, and still remained unsold at the date of the information.

The several annuitants mentioned in the testator's will (except Marie Gräf) were still living.

The income arising from the testator's residuary estate had always exceeded the amount of the annuities.

The defendants, who were the existing trustees of the will, were resident in England. They were in possession and in receipt of the income of the whole of the property subject to the trusts of the will.

The Crown claimed that on the death of Henry James Reeves there became payable succession duty on the interests accruing in possession to the seven surviving persons entitled to the surplus income of the residuary estate in so much of one eighth share of the said surplus income as was attributable to the Meleng estate, and also that estate duty and settlement estate duty became payable on the principal value of so much of one eighth share of the residuary estate as was attributable to the Meleng estate. And, further, the Crown claimed that on the death of Marie Gräf there became payable succession duty on the interests accruing in possession to the six survivors by the

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cesser of her annuity and of her interest in the surplus income so far as attributable to the Meleng estate, and also estate duty and settlement estate duty in respect of the benefit accruing by the cesser of the said annuity and interest in surplus income so far as attributable as aforesaid.

Sir J. Lawson Walton, A.-G., and *Vaughan Hawkins*, for the Crown. Though the actual estate itself is situate at Meleng, in Assam, the interest which the testator has created, and which he has devised or bequeathed by his will, is situate in England. The testator was a domiciled Englishman, his will is in English form, his executors and trustees are English, and his beneficiaries have acquired a right to have the trusts of the will executed by the English Courts. They have therefore acquired an English equitable chose in action, which is situate where it can be put in suit: *In re Smyth.* (1)

By the well-known doctrine of the Courts of Equity the property has, by virtue of the trust for sale, ceased to be real and become personal property: *Forbes* v. *Steven* (2); *Attorney-General* v. *Marquis of Ailesbury.* (3) That conversion was effected on the death of the testator; the property then became personalty, and now follows his English domicil. The cardinal point in this case is that the whole estate has become personalty; for the present it stands invested in real property, and that property is situate abroad, but that is an immaterial fact. By the fact of taking out probate, executors, who are also trustees, accept the trusts of the will as well as the office of legal personal representatives, and the acceptance of those trusts extends to the whole property which, under the terms of the will, is the subject of the trust, real as well as personal, although the real estate cannot be, and part of the personal estate may not be, within the jurisdiction of the Court of Probate: *Ewing* v. *Orr Ewing.* (4) The postponement of the actual conversion until after the death of one or more of the beneficiaries is also immaterial for this purpose: *Attorney-General* v. *Dodd.* (5) The fallacy

(1) [1898] 1 Ch. 89.
(2) (1870) L. R. 10 Eq. 178.
(3) (1887) 12 App. Cas. 672.
(4) (1883) 9 App. Cas. 34, at pp. 39, 40.
(5) [1894] 2 Q. B. 150.

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in the argument for the defendants is in treating them as entitled to the property in specie, a fallacy clearly pointed out by Lopes L.J. in *Attorney-General* v. *Lord Sudeley* (1) and by Lord Halsbury L.C. in *Lord Sudeley* v. *Attorney-General*. (2) The case of *In re Stokes* (3) is to the same effect, where rents and profits of real estate situate abroad were, pending conversion, treated as personalty and held to be liable to legacy duty.

On the death of Henry James Reeves on November 12, 1903, and of Marie Gräf on December 27, 1905, there was a passing of property, and estate duty became payable. [*In re Cigala's Settlement Trusts* (4), *Attorney-General* v. *Campbell* (5), and *In re Piercy* (6) were also cited.]

Danckwerts, *K.C.*, and *Errington*, for the defendants. It is not disputed that real property situate abroad which is conveyed or devised to trustees in trust for sale may be liable to succession duty or to estate duty. But it becomes so liable only if and when the property is sold and converted into money. This is the distinction between *In re Smyth* (7) and the present case. There at the time that the duty was claimed the trust for sale of the foreign real property had taken effect, and what the legatees had become entitled to was the proceeds of the sale, and under those circumstances it was held that the interest of a legatee of a share of the proceeds was subject to probate duty, whereas here the tea estate in Assam still remains unconverted; and it may happen that it will never be converted, for the trustees have an absolute discretion to postpone the sale as long as they think fit, and the will contains no ultimate disposition of the property after the death of the last annuitant and of the last person entitled to the surplus income. Although land devised in trust for conversion may, if situate in this country, be treated as personalty as from the date of the testator's death, it is otherwise with land situate abroad. Until conversion the interest of a beneficiary in the income of land abroad is not an

(1) [1896] 1 Q. B. 354.
(2) [1897] A. C. 11.
(3) (1890) 62 L. T. 176.
(4) (1878) 7 Ch. D. 351.
(5) (1872) L. R. 5 H. L. 524.
(6) [1895] 1 Ch. 83.
(7) [1898] 1 Ch. 89.

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equitable chose in action recoverable in the English Courts. The Courts here have no jurisdiction to enforce the trusts of a will relating to land situate abroad. For the interest which a beneficiary takes in such land must depend upon the law, not of England, but of the foreign country, and must be determined by the Courts of that country. The incidents to real estate, the right of alienating or limiting it, and the course of succession to it depend entirely on the law of the country where the estate is situated: *Earl Nelson* v. *Lord Bridport*. (1) The Courts here will not entertain an action to recover arrears of rent-charge upon lands in Australia: *Whitaker* v. *Forbes* (2); and an interest the recovery of which the English Courts have no jurisdiction to enforce is not an English asset, and is consequently not the subject of English duty.

In *Wallace* v. *Attorney-General* (3) it was held that the language of the Succession Duty Act, 1853, which in terms makes succession duty payable in respect of "every past or future disposition of property," did not apply to legacies under the will of a person domiciled in a foreign country. Lord Cranworth L.C. there said: "Some limitation must be implied, and that limitation can only be a limitation confining the operation of the words to persons who become entitled by virtue of the laws of this country." And a person entitled under a will to a share of income derived from real property abroad does not claim title by virtue of our law within that rule, and therefore is not liable to duty. In *Chitty* v. *Parker* (4), where there was a trust for sale, and all the legacies were satisfied without the land being sold, it was held that, notwithstanding the trust for conversion, the land went to the heir, and not to the next of kin. Therefore here, if the Meleng estate remains unconverted at the date of the cesser of the last of the life interests, it will continue to be realty and will go to the heir of the testator. Where land abroad is devised in trust for sale the rents of the land until sale devolve according to the law of the foreign country where it is situate: *In re Piercy*. (5) The income which the beneficiaries here receive no doubt comes

(1) (1846) 8 Beav. 547.
(2) (1875) 1 C. P. D. 51.
(3) (1865) L. R. 1 Ch. 1.
(4) (1793) 2 Ves. Jun. 271.
(5) [1895] 1 Ch. 83.

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through the hands of trustees, but it is not for that reason any the less income from the land.

Vaughan Hawkins, in reply. In *In re Smyth* (1) part of the money which was there held to be the subject of probate duty consisted of the income derived from foreign real estate between the date of the testator's death and the conversion. Therefore that case covers the very point which is raised here; and it makes no difference that in that case there was no power to the trustees to postpone the conversion. A direction for conversion makes the property personalty as from the date of the will: *Doughty* v. *Bull* (2); and the property remains in a state of equitable conversion however long it may remain unsold: *Attorney-General* v. *Lomas*. (3) With regard to the rule laid down by Lord Cranworth in *Wallace* v. *Attorney-General* (4), to the effect that the Succession Duty Act only applies to "persons who become entitled by virtue of the laws of this country," Stirling L.J. in *Attorney-General* v. *Jewish Colonization Association* (5) pointed out that if interpreted literally it is inconsistent with *Attorney-General* v. *Campbell* (6), where the law of the testator's foreign domicil had to be considered for the purpose of ascertaining his testamentary capacity, and said that that rule, "if it is to be treated as now binding, must be taken to be satisfied where property is found to be legally vested in a person subject to the jurisdiction of English Courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the laws of England"—which is the case here, the property being settled by an English will and vested in English trustees.

Cur. adv. vult.

July 31. BRAY J. read the following judgment:—In this case the Crown claimed estate duty and succession duty on property passing on the death of Henry James Reeves on November 12, 1903, and on the death of Marie Gräf on December 27, 1905, and the main question raised was whether the property in each case was situate out of the United Kingdom. The Crown alleged that

(1) [1898] 1 Ch. 89.
(2) (1725) 2 P. Wms. 320.
(3) (1873) L. R. 9 Ex. 29.
(4) L. R. 1 Ch. 1.
(5) [1901] 1 K. B. 123.
(6) L. R. 5 H. L. 524.

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it was not, and the defendants contended that it was. The Crown also contended that, even if it was situate out of the United Kingdom, it was liable to duty under s. 2, sub-s. 2, of the Finance Act, 1894, as being subject to succession duty, but the first contention was the main one.

The facts were these. One Joseph Edward Todd, a domiciled Englishman, was at the time of his death, May 16, 1896, entitled to real estate in Upper Assam, called the Meleng estate, and carried on the business of a tea planter there. By his will, dated October 1, 1895, after bequeathing certain legacies, he left the residue, which included the Meleng estate, to trustees, who, after dealing with the estate and the business in a manner to which I shall have to refer in detail presently, were to apply the income first to the payment of certain annuities, and then to distribute the surplus among eight persons (of whom Henry James Reeves and Marie Gräf were two) or the survivor or survivors thereof in equal shares. He did not provide for what was to happen after the death of the last annuitant or the last of the eight persons. The will was proved in this country by Reeves and estate duty paid in respect of the personal estate of the value of 45,356*l.* 15*s.* 5*d.*, and settlement estate duty was paid in respect of the residue of the personal estate of the value of 33,050*l.*, but no duty was paid in respect of the Meleng estate. The trustees were all resident in this country, and, under the powers given to them by the will, postponed the sale of the Meleng estate, appointed a manager to manage that estate, and through him carried on the testator's business of a tea planter. The income arising from the testator's residuary estate, including the rents and profits of the Meleng estate, had always, so far as they had been made up, viz., to the end of 1905, exceeded the amount of the annuities bequeathed by the will. When Reeves died on November 12, 1903, the share of the income which he received passed to the other seven, and they received one seventh, instead of, as before, one eighth, of the surplus income. When Marie Gräf died on December 27, 1905, the remaining six received one sixth instead of only one seventh of the surplus income, and that surplus income was further increased by the dropping of Marie Gräf's annuity of 100*l.* a year. It was in

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respect of the increased benefit which first the seventh and afterwards the six received that the duty was claimed.

The question, therefore, which I have to decide is whether the shares of Reeves and Gräf in the surplus income, and Gräf's annuity or the increased share of the others, were property situate out of the United Kingdom. It was not suggested that there was any difference between the shares of surplus income and the annuity. I think it is clear that, but for the intervention of the trustees and the special directions and powers given to them, the property would have been situate out of the United Kingdom. It consisted of real estate in Upper Assam and the profits of a business carried on there, and both would be property locally situate out of the United Kingdom: see *Laidlay* v. *Lord Advocate* (1); but it was said on behalf of the Crown that by reason of the trusts of the will the property which these persons had was merely a right to have the trusts of the will carried out, and that, the will being an English will and the trustees being in this country, the right was a right which could only be enforced here, and that the property was therefore situate here. It is necessary, therefore, to examine the trusts of the will. They are contained in clauses 5, 6 and 7. Clause 5 is as follows: [He read the clause as above set out.]

Now if it had stopped there it was conceded that I should be bound by the authorities to hold that the property was situate here, because it has been clearly laid down that by a trust for sale realty may in equity be converted into personalty: see *Fletcher* v. *Ashburner* (2); and, further, that if it is so converted in equity it is treated as converted for fiscal purposes also: *Attorney-General* v. *Dodd.* (3) But reliance was placed on clauses 6 and 7, and on the fact that the estates had not in fact been converted into money at the time of these deaths, and, it was said, might never be converted into money, as there was no gift of the residue after the death of the last of the eight persons and the annuitants. It was further said that the rights of these persons depended upon the law of Upper Assam, and that the Courts here would not entertain an action

(1) (1890) 15 App. Cas. 468. (2) (1779) 1 Br. Ch. 497.
(3) [1894] 2 Q. B. 150.

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to administer the trusts of the will, because it depended upon that law.

The last point seems to present little difficulty. In *Ewing* v. *Orr Ewing* (1) Lord Selborne says that the Courts of Equity in England have always been accustomed to compel the performance of contracts and trusts as to subjects which are not "either locally or ratione domicilii within their jurisdiction." They have done so as to land in Scotland, in Ireland, in the Colonies, and in foreign countries: see *Penn* v. *Baltimore* (2), and the notes to that case. Reliance was placed by the defendant's counsel on Lord Cranworth's statement in *Wallace* v. *Attorney-General* (3), that the only way of solving this question is to consider the duty as imposed only on those who claim by virtue of our law; but Stirling L.J. disposes of that in *Attorney-General* v. *Jewish Colonization Association* (4), where he says: "Lord Cranworth's rule therefore, if it is to be treated as now binding, must be taken to be satisfied where property is found to be legally vested in a person subject to the jurisdiction of English Courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the laws of England, even although the operation of the instrument creating the title may to some extent be governed by foreign law." The same point must have been decided in the same way in *Attorney-General* v. *Lord Sudeley* (5), *In re Smyth* (6), and *In re Cigala's Settlement Trusts* (7), in each of which cases the trustees had to deal with property situate out of the United Kingdom.

As regards the other point there is perhaps more difficulty. Clauses 6 and 7 of the will were as follows: [He read the clauses as above set out.] It was said on behalf of the Crown that, notwithstanding these clauses, it was the intention of the testator, to be gathered from the whole will, that his property should be converted into personalty. Reading the whole will together, I have no doubt that that was his intention. He gave a direction to his trustees to sell, and the object of clauses 6 and 7 was to give the trustees a

(1) 9 App. Cas. 34, at p. 40.
(2) (1750) 1 Ves. Sen. 444.
(3) L. R. 1 Ch. 1, at p. 8.
(4) [1901] 1 K. B. 123, at p. 142.
(5) [1896] 1 Q. B. 354; [1897] A. C. 11.
(6) [1898] 1 Ch. 89.
(7) 7 Ch. D. 351.

discretion to temporarily postpone the sale and to provide for what was to happen during the temporary postponement. He never intended that these eight persons should have any share of his real estate or of his business, and they could never have entered into possession as suggested in argument. He wished it to be dealt with and managed by his trustees, and not by the beneficiaries. He merely gave the latter the right, as Lopes L.J. put it in *Attorney-General* v. *Lord Sudeley* (1) and Romer J. in *In re Smyth* (2), of having the trusts of the will administered in the proper forum, viz., in the Courts of this country, and the net surplus divided amongst them. It was an English chose in action. I think the present case is virtually covered by those authorities, and I must find that the property which passed on the death of those two persons was property not situate out of the United Kingdom, and therefore liable both to estate duty and succession duty. There is no hardship in this. It has become property in England because the testator wished that it should be so. He wished to have English trustees, and that the English Courts should be the forum to enforce the trusts of the will. As to the part of it, if any, which has already paid settlement estate duty, I understand it is agreed that the duty has not to be paid over again.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Surman & Quekett.*

(1) [1896] 1 Q. B. 354. (2) [1898] 1 Ch. 89.

J. F. C.

Considered. In re DEBTOR, No. 21 OF 1950 (No. 2) [1951] 1 Ch. 612

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July 31.

In re A DEBTOR. *Ex parte* PETITIONING CREDITORS.

Bankruptcy—Practice—Costs Part of Petitioning Creditors' Debts—Petition dismissed—Set-off of Costs.

There can be no set-off of costs in bankruptcy proceedings between a creditor and his debtor where the creditor makes costs payable to him part of the debt on which he bases his bankruptcy petition against his debtor; although, if such costs had not been made part of the petitioning creditor's debt, a set-off of costs would have been allowed. Costs payable by a debtor on failing to set aside a bankruptcy notice, and costs payable by the creditor on the dismissal with costs of his bankruptcy petition based on such notice, may be set off.

THIS was a motion to review the taxing Master's decision under these circumstances.

On June 27, 1906, the petitioning creditors obtained judgment against the debtor for the sum of 1430*l.* 12*s.* 10*d.* in an action in the High Court, and on March 21, 1907, they served him with a bankruptcy notice based on the judgment debt.

On April 11, 1907, an application by the debtor to set aside the bankruptcy notice was dismissed with costs to be paid by the debtor, and these costs were taxed and allowed at 12*l.* 19*s.* 2*d.*

On May 21 the petitioning creditors presented a bankruptcy petition against the debtor based on the judgment debt and the said sum of 12*l.* 19*s.* 2*d.* for taxed costs; the act of bankruptcy relied on being the non-compliance with the bankruptcy notice.

On June 6 the petition was on technical grounds dismissed with costs to be paid by the petitioning creditors, and these costs were taxed and allowed at 19*l.* 1*s.* 4*d.*

On the taxation before the taxing Master under the order of June 6 the petitioning creditors objected to the allowance of the sum of 19*l.* 1*s.* 4*d.* on the ground that they were entitled to set off against that sum the 12*l.* 19*s.* 2*d.*, being the amount of the taxed costs found due by the debtor to the petitioning creditors under the order of April 11. The taxing Master overruled the objection, and stated: "If these two bills had been costs pure and simple, I should have had no hesitation in directing that those payable by the debtor under the order of April 11, 1907, should

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be set off against those payable to him under the order of June 6, 1907, but the taxed costs under the first order formed part of the petitioning creditors' debt on which they based their petition, and in my opinion costs cannot and ought not to be set off against a debt, or any part of a debt, even although the latter happens to be in the nature of costs. The practice of this Court has always been against such a contention, and, if it were once admitted, it might affect the amount of the petitioning creditor's debt (on which he bases his petition) and also (conceivably) prejudice the rights of other creditors. I have considered the cases of *Bryon* v. *Metropolitan Saloon Omnibus Co.* (1) and *Barker* v. *Hemming* (2), which have been cited, but I do not consider either of them touches this point."

The petitioning creditors now moved, by way of review of the decision of the taxing Master, that their objection might be allowed and that the costs in question might be set off.

Whinney, for the creditors. Both sets of costs arose in bankruptcy matters between the same parties, and it is the invariable practice in bankruptcy to set off costs against costs in bankruptcy proceedings between the same parties: *Bryon* v. *Metropolitan Saloon Omnibus Co.* (1); *Barker* v. *Hemming.* (2) The reason which prevents costs being set off against a petitioning creditor's debt does not apply to a case of costs against costs. Merely making costs part of a petitioning creditor's debt does not alter their character as costs. Moreover, the difficulty raised here by the taxing Master does not exist, because the petition was dismissed and there is no bankruptcy. Therefore, no question can arise as to rights of other creditors.

Hansell, for the debtor. In the first place, the case falls within the principle that a petitioning creditor, whose petition is dismissed, will not be allowed to set off his debt against the debtor's costs of the petition. If such a set-off were allowed, the creditor would get payment in full to the extent of the costs. Here the 12*l.* 19*s.* 6*d.* is made part of the petitioning creditors' debt, and, therefore, there can be no set-off against the costs they have to pay the debtor. There is no authority directly in point.

(1) (1859) 4 Drew. 546. (2) (1880) 5 Q. B. D. 609.

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Secondly, there can be no set-off because the application to set aside the bankruptcy notice and the bankruptcy petition were separate proceedings although between the same parties: *Barker* v. *Hemming* (1); *Ex parte Griffin* (2); *David* v. *Rees* (3); *In re Bassett.* (4)

Whinney, in reply.

BIGHAM J. I have before me the answer of the taxing Master to the objection taken by the petitioning creditors to the allowance of these costs. He says: "If these two bills had been costs pure and simple, I should have had no hesitation in directing that those payable by the debtor under the order of April 11, 1907, should be set off against those payable to him under the order of June 6, 1907, but the taxed costs under the first order formed part of the petitioning creditors' debt on which they based their petition, and in my opinion costs cannot and ought not to be set off against a debt, or any part of a debt, even although the latter happen to be in the nature of costs. The practice of this Court has always been against such a contention." It is sufficient for me to say that I accept his statement as to the practice and feel bound to act upon it. Therefore, this application fails and must be dismissed with costs.

Solicitors: *Stephenson, Harwood & Co.; Wild & Co.*

(1) 5 Q. B. D. 609.
(2) (1880) 14 Ch. D. 37.
(3) [1904] 2 K. B. 435.
(4) [1896] 1 Q. B. 219.

H. L. F.

In re MAYNE.
Ex parte THE OFFICIAL RECEIVER.

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July 31.

Bankruptcy—Proof by Assignee of Creditor—Costs due by Creditor to Trustee —Dividend on Proof—Trustee's Right to retain Dividend against Costs— Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 58.

A creditor assigned for value all her claims against a bankrupt and her assignees lodged a proof against the bankrupt's estate, which was admitted. A dividend became payable in respect of the proof:—

Held, that the trustee was entitled to retain the dividend against taxed costs which the creditor had been ordered to pay to him.

THIS was a motion by the trustee in bankruptcy that he might be declared entitled to retain the dividend payable on a proof in satisfaction of certain taxed costs due to him under these circumstances.

In October, 1901, a receiving order was made against the debtor and adjudication followed, and the official receiver became the trustee.

In November, 1901, Lady Oxenden lodged a proof against the bankrupt's estate for some 1500*l.*, and in July, 1906, this proof was rejected by the trustee.

On December 3, 1906, an appeal by Lady Oxenden against the trustee's rejection of her proof was dismissed by the judge in bankruptcy with costs, and these costs were taxed at 31*l.* 3*s.* 4*d.* On December 24 Lady Oxenden gave notice of appeal to the Court of Appeal against the decision of the judge, and on April 12, 1907, her appeal was dismissed with costs by the Court of Appeal, but without prejudice to any fresh proof of debt she might tender against the estate in respect of matters not dealt with in her rejected proof. The trustee's costs of this appeal were taxed at 36*l.* 8*s.* 4*d.*, and, after deducting the 20*l.* paid into Court by Lady Oxenden as security for the costs of the appeal, the amount payable by her was 16*l.* 8*s.* 4*d.* The total amount, therefore, of taxed costs payable by her to the trustee in respect of these two appeals was 47*l.* 11*s.* 8*d.*

Meanwhile, Lady Oxenden had, on April 9, 1907, assigned by way of charge to her solicitors, Messrs. Dyson, Smith & Marchant,

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in consideration of their prosecuting her then pending appeal to the Court of Appeal, the whole of her interest of whatever nature or kind that she might have or become entitled to receive out of the estate of the bankrupt to secure to them the costs already incurred and to be incurred by them in the matter, and thereby constituted them her attorneys to receive and give effectual receipts for any sum or sums that might become payable to her from the said estate. Notice of this assignment was given to the trustee.

On May 10 Messrs. Dyson, Smith & Marchant, as assignees of Lady Oxenden, lodged a fresh proof for 130*l.* against the bankrupt's estate. This proof was admitted, and a dividend of 25*l.* became payable in respect of it which Messrs. Dyson, Smith & Marchant claimed to be paid to them. The trustee now applied for a declaration that he was entitled to retain the dividend payable on the proof of 130*l.* to satisfy or on account of the taxed costs ordered to be paid to him by Lady Oxenden under the orders of December 3, 1906, and April 12, 1907.

Hansell, for the motion. It is admitted that there is no mutual credit or set-off between the trustee and Lady Oxenden's solicitors in respect of the dividend on this proof, but it is submitted that the principle of *In re Leeds and Hanley Theatres of Varieties, Ld.* (1) applies, and that the trustee is entitled to retain this dividend towards satisfaction of the costs due to him by Lady Oxenden.

[He was stopped.]

Tindale Davis, for the solicitors. Under s. 58 of the Bankruptcy Act, 1883, the dividend is to be paid to the creditor whose proof is on the file, and he is the only person who can give a discharge for it: *In re Cook* (2); *In re Frost* (3); and there is no power under the Act or the rules to attach, garnish, or charge a dividend: *Prout* v. *Gregory*. (4) Here, the assignees, whose proof is on the file, are the only persons who can give the trustee a receipt for the dividend on their proof, and he is not entitled, as against them, to retain the dividend in respect of costs which

(1) [1904] 2 Ch. 45.
(2) [1899] 1 Q. B. 863.
(3) [1899] 2 Q. B. 50.
(4) (1889) 24 Q. B. D. 281.

Lady Oxenden has been ordered to pay. There is no debt due by the assignees to Lady Oxenden or to the trustee. He ought to have rejected the proof until the costs due by Lady Oxenden had been paid or provided for.

BIGHAM J. I think the facts of this case are of themselves sufficient to shew that the application of the trustee is well founded. The proof is in substance a proof by assignees in the name of their assignor, Lady Oxenden, and, unless there had been a debt due to her from the bankrupt, that proof could not be sustained. The proof has been admitted, and in my opinion what the trustee owes is the difference between the dividend on the proof and the sum for costs which Lady Oxenden has been ordered to pay to him in respect of her unsuccessful proceedings in the bankruptcy. She had no power to assign anything more to her solicitors. If there is no difference due to her under the proof, her assignees will get nothing. I hold, therefore, that the trustee is entitled to retain dividends under the proof sufficient to satisfy the costs due to him by Lady Oxenden.

Solicitors: *Adams & Adams; Dyson, Smith & Marchant.*

H. L. F.

C. A.

1907

June 10, 11, 25.

[IN THE COURT OF APPEAL.]

LANCASHIRE AND CHESHIRE COAL ASSOCIATION AND OTHERS *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY AND LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway Rates—Short Distance—Merchandise "conveyed" by the Company partly on its own Railway and partly on another Railway.

By clause 11 of the schedule to the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), "Where merchandise is conveyed for an entire distance which does not exceed . . . . in the case of merchandise in respect of which no station terminal is chargeable six miles, the company may . . . . make the charges for conveyance authorized by this schedule as for . . . . six miles . . . . : Provided that where merchandise is conveyed by the company partly on the railway and partly on the railway of any other company the railway and the railway of such other company shall, for the purpose of reckoning such short distance, be considered as one railway."

The London and North Western Railway Company accepted goods for conveyance for an entire distance partly on their own railway and partly on the railway of the Lancashire and Yorkshire Railway Company; in one instance the entire distance was less than six miles, in another instance the distance conveyed over the London and North Western line was more than, and over the Lancashire and Yorkshire line was less than, six miles. In both instances the traffic was taken by the engines of the respective companies over their own lines, except that, for convenience of working, the engine of the Lancashire and Yorkshire Company picked up the traffic at a siding on the London and North Western line about two miles short of the junction of the two railways and conveyed it thence to its destination:—

Held by Vaughan Williams L.J. and Fletcher Moulton L.J. (Buckley L.J. in part dissenting), that the proviso only applied where the total transit was less than six miles and there was a conveyance or carriage by the London and North Western Railway Company over both the railways, and that there had not been such a conveyance by that company merely because they had received the traffic to be carried to its destination at a through rate. In the first instance, therefore, the London and North Western Company were entitled to charge two short distance rates, and in the second to charge a mileage rate over their own line and a short distance rate over the line of the Lancashire and Yorkshire Company.

The expression "conveyed" in the proviso does not refer merely to the physical haulage of the traffic.

Decision of the Railway and Canal Commission, [1906] 1 K. B. 577, affirmed on different grounds.

APPEAL from the decision of the Railway and Canal Commission (Bigham J., Sir Frederick Peel, and the Hon. A. E. Gathorne-Hardy), upon the joint application of colliery owners and railway companies for the determination of certain differences between the parties. (1) The joint application was in the following terms:—

(1.) Richard Evans & Co., Limited (hereinafter called the colliery company), are the owners of certain collieries in the county of Lancashire, connected by sidings at Edge Green, Golborne, and Earlestown Haydock respectively with the railway of the London and North Western Railway Company. The said sidings join the railway at points a few miles to the south of Wigan, as hereinafter mentioned.

(2.) The colliery company are in the habit of consigning large quantities of coal from their said sidings to Pagefield siding, which is situate on and connected with the line of the Lancashire and Yorkshire Railway Company a little way to the north of Wigan, as hereinafter mentioned.

(3.) In consigning this traffic the colliery company (as they are entitled to do) deal only with the London and North Western Railway Company, who accept and forward the traffic, quote the rates, and receive from the colliery company payment of the charges due in respect of the said traffic.

(4.) The said traffic passes over the railways of the said respective railway companies as follows:—

From Edge Green siding to Pagefield siding:	Miles.	Chains.
Over the London and North Western Railway to Wigan Junction, a distance of	3	68
Over the Lancashire and Yorkshire Railway from Wigan Junction to Pagefield siding	1	19
Making a total distance of . .	5	7

(1) [1906] 1 K. B. 577.

C. A. 1907

LANCASHIRE AND CHESHIRE COAL ASSOCIATION v. LONDON AND NORTH WESTERN RAILWAY AND LANCASHIRE AND YORKSHIRE RAILWAY.

From Golborne Colliery siding to Pagefield siding:

	Miles.	Chains.
Over the London and North Western Railway to Wigan Junction . . .	4	48
Over the Lancashire and Yorkshire Railway from Wigan Junction to Pagefield siding	1	19
Making a total distance of . .	5	67

From Earlestown Haydock to Pagefield siding:

	Miles.	Chains.
Over the London and North Western Railway to Wigan Junction . . .	7	78
Over the Lancashire and Yorkshire Railway from Wigan Junction to Pagefield siding	1	19
Making a total distance of . .	9	17

(5.) The arrangement for working the traffic between the two railway companies is that the said traffic is worked from the said colliery sidings to Pagefield siding in the following manner:—

The traffic is taken from the colliery sidings to the Bamfurlong sidings of the London and North Western Railway, the distance from each of the colliery sidings to the Bamfurlong sidings being respectively as follows:—

	Miles.	Chains.
Edge Green Colliery	1	61
Golborne Colliery	2	41
Earlestown Haydock	5	71

From Bamfurlong sidings to Wigan Junction, a distance of 2 miles 7 chains, the traffic is taken by the engines of the Lancashire and Yorkshire Railway Company, which company's engines continue to convey the traffic over their own line from Wigan Junction to Pagefield siding a further distance of one mile nineteen chains.

(6.) Under and by virtue of the London and North Western Railway Company (Rates and Charges) Order Confirmation Act,

1891 (54 & 55 Vict. c. ccxxi.), and the order and schedule of maximum rates and charges, and the classification of merchandise traffic thereby confirmed, coal is comprised in Class A of the said classification, and the London and North Western Railway Company are entitled to charge on the portion of their railway over which the traffic in question travels, in respect of merchandise comprised in Class A, for the first twenty miles, or any part of such distance, per ton per mile 0·95*d.* And under and by virtue of the Railway Rates and Charges No. 10 (Lancashire and Yorkshire, &c.) Order Confirmation Act, 1892, and the order and schedule of maximum rates and charges and classification of merchandise traffic thereby confirmed, coal is comprised in Class A of the said classification, and the Lancashire and Yorkshire Railway Company are entitled to charge on all parts of their railway, in respect of merchandise comprised in Class A, for the first twenty miles, or any part of such distance, per ton per mile 1*d.*

(7.) The said orders and schedules of the London and North Western Railway Company and of the Lancashire and Yorkshire Railway Company each of them contain the following provision, the words in brackets ("except as hereinafter specially provided") being, however, omitted in the Lancashire and Yorkshire schedule:—

Clause 11. "Where merchandise is conveyed for an entire distance which does not exceed in the case of merchandise in respect of which a station terminal is chargeable at each end of the transit three miles, or in the case of merchandise in respect of which a station terminal is chargeable at one end of the transit four-and-a-half miles, or in the case of merchandise in respect of which no station terminal is chargeable six miles, the company may (except as hereinafter specially provided) make the charges for conveyance authorized by this schedule as for three miles, four-and-a-half miles, and six miles respectively: Provided that where merchandise is conveyed by the company partly on the railway and partly on the railway of any other company the railway and the railway of such other company shall, for the purpose of reckoning such short distance, be considered as one railway."

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(8.) The applicants will also crave leave to refer to divers other provisions of the said orders and schedules.

(9.) The traffic is conveyed from private siding to private siding, and is invariably carried in trucks provided by the owners of the traffic. There is, therefore, no charge payable for station terminals, and no charge payable for the use of trucks belonging to either of the said railway companies.

(10.) The London and North Western Railway Company claim to be entitled to charge in respect of the said traffic from Edge Green to Pagefield siding, and from Golborne to Pagefield siding, in each case per ton:—

	d.
For 6 miles on the London and North Western Railway Company at 0·95*d.* per mile.	5·7
For 6 miles on the Lancashire and Yorkshire Railway at 1*d.* per mile	6·0
Making in all	11·7

(11.) In respect of the traffic from Earlestown Haydock to Pagefield siding the said railway company claim to be entitled to charge per ton:—

	s.	d.
For 7 miles 78 chains on the London and North Western Railway at 0·95*d.* per mile.	0	7·6
For 6 miles on the Lancashire and Yorkshire Railway at 1*d.* per mile . . .	0	6
	1	1·6

(12.) The colliery company claim that in the circumstances aforesaid under the schedules of maximum rates and charges and classification of merchandise traffic aforesaid, and upon the true construction of clause 11 of the said orders and schedules respectively, the London and North Western Railway Company are not entitled to charge the several rates claimed by them in respect of the traffic aforesaid, but are entitled only to make charges in respect thereof not exceeding the following:—

From Edge Green and Golborne Colliery respectively to Pagefield siding, per ton . .	6*d.*
From Earlestown Haydock to Pagefield siding, a charge per ton for 7 miles 78 chains on the London and North Western Railway . .	*d.* 7·6
1 mile 19 chains on the Lancashire and Yorkshire Railway	1·25
Making a total charge per ton of . .	8·85

(13.) Differences having thus arisen between the Lancashire and Cheshire Coal Association and Richard Evans & Co., Limited, on the one hand, and the London and North Western Railway Company and the Lancashire and Yorkshire Railway Company on the other hand, they agreed to refer to the Court for their decision the following differences :—

(1.) Whether in the circumstances above set out the London and North Western Railway Company is entitled to charge the colliery company, in respect of the traffic aforesaid, the rates and charges respectively claimed by the said railway company as aforesaid.

(2.) Or whether the said railway company is entitled to charge the colliery company, in respect of the traffic aforesaid, the rates and charges claimed to be chargeable by the colliery company as aforesaid.

(3.) Or what are the several maximum rates and charges with which the railway company is entitled to charge the colliery company in respect of the said traffic.

The Railway and Canal Commission gave judgment in favour of the railway companies. (1) The colliery owners appealed.

Balfour Browne, K.C., and *C. A. Russell, K.C* (*Darlington* with them), for the colliery owners. The interpretation put upon clause 11 by the Divisional Court is wrong ; it gives no meaning to the words "for an entire distance." The meaning of the clause, taken with the proviso, is that where coal is conveyed for an entire distance over the lines of two railway companies there

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can only be a charge for one short distance and not for two. "Conveyed" in that clause has nothing to do with physical haulage; it means "contracted to be carried." The contract is with the London and North Western Railway Company, and the change of haulage when the goods are handed over by that company to the Lancashire and Yorkshire Company cannot affect the contractual rights of the trader with the London and North Western. Clause 24 of the London and North Western Order (which is also contained in the Lancashire and Yorkshire Order) shews that when the one company moves over the lines of the other it has the powers of the other company. The words "authorized by this schedule" in clause 11 shew that the London and North Western schedule applies over the whole distance, including the portion of the Lancashire and Yorkshire line travelled over. The London and North Western are the carriers for the entire distance; the Lancashire and Yorkshire do not carry, except in the capacity of agents of the London and North Western. If the contention of the railway companies is right, they can always manipulate the journey by changing engines at a place which will give two short distances. Being one entire contract, only the London and North Western can make a charge in respect of the conveyance. The proviso has the effect of making the mileage run over the Lancashire and Yorkshire line a mileage over the London and North Western for purposes of charge; the two railways are to be considered as one railway. The result is that in cases 1 and 2 there is power to make one short distance charge, but not two; while in case 3 there is no short distance charge at all, as the distance travelled on the London and North Western is over six miles.

Cripps, K.C., and *J. A. Simon* (*Moon, K.C.*, with them), for the railway companies. The charges made by the railway company have nothing to do with the contract of carriage. Before the commencement of a journey certain initial charges, such as the cost of getting up steam, marshalling trucks, &c., must necessarily be incurred, and if the conveyance is for less than a certain distance the railway company does not get a reasonable or sufficient remuneration; the object of the short distance clause was to give the company an adequate remuneration when it has

only carried traffic for a short distance. Apart from the proviso, clause 11 deals only with the London and North Western Company and with traffic on their line, and entitles them to a short distance charge; the object of the proviso is to give them a remunerative charge, whether the whole distance run is on the London and North Western line or not. The expression "conveyed by the company" in the proviso refers to the distance which the London and North Western haul the coal, and it is immaterial whether the distance is wholly over their line, or partly over their line and partly over the Lancashire and Yorkshire system. When a new company takes over the goods and begins a new service, the charge begins again. Part of the conveyance is by the London and North Western and part by the Lancashire and Yorkshire, who do not use their engine as agents for the former company, but on their own account, and who are under no obligation to allow the engine of the London and North Western Company to come upon their metals. If the contention of the colliery companies is right, the whole of the short distance clause is of necessity obliterated. If the colliery companies think that the charges work out unfairly, their proper remedy is to apply to the Railway and Canal Commission for a through rate.

C. A. Russell, K.C., in reply.

Cur. adv. vult

June 25. VAUGHAN WILLIAMS L.J. read the following judgment:—This case, when before the Railway Commissioners on the joint application of the colliery owners and the railway companies, was argued on both sides on the basis that the question to be argued depended upon the meaning to be given to the expression "conveyed" in the proviso to clause 11 of the schedule to the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, which runs thus: "Where merchandise is conveyed for an entire distance which does not exceed in the case of merchandise in respect of which a station terminal is chargeable at each end of the transit three miles, or in the case of merchandise in respect of which a station terminal is chargeable at one end of the

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transit four-and-a-half miles, or in the case of merchandise in respect of which no station terminal is chargeable six miles, the company may (except as hereinafter specially provided) make the charges for conveyance authorized by this schedule as for three miles, four-and-a-half-miles, and six miles respectively: Provided that where merchandise is conveyed by the company partly on the railway and partly on the railway of any other company the railway and the railway of such other company shall, for the purpose of reckoning such short distance, be considered as one railway." It is said in the head-note to the report that the expression "conveyed" in the proviso refers not to the contract of carriage but to physical haulage. This is not exactly what is said by Bigham J. in the report of his judgment. He says: "I think Mr. Cripps' view of the meaning of the word 'conveyed' is the right one. I think it means 'actually carried,' and that the word is not to be interpreted as referring to any contract of carriage made between the goods owner and the railway company." But I have no doubt but that when Bigham J. says, "But the London and North Western Railway Company do not carry the goods over two railways at all, and therefore are not affected by the proviso," he is referring to haulage as a material fact in arriving at that conclusion.

The whole case turns upon the meaning of the proviso to clause 11 of the schedule to the London and North Western Railway Act. Mr. Balfour Browne and Mr. C. A. Russell, who appeared for the colliery owners, put their case in this way: "The coal is conveyed by the London and North Western Railway Company partly on its own railway and partly on the Lancashire and Yorkshire Railway. The word 'conveyed' in the proviso means contracted to be carried. Here the only contract of carriage is that the London and North Western Railway Company undertake to carry the coal from point to point at a through rate. The colliery owners deal exclusively with that company, and no other." I find it difficult to come to the conclusion that the rate of charge by the London and North Western Railway Company over railways belonging to their system can be governed or affected by the contract that the railway company make with individual consignors for delivery at

a point which is outside their railway system, and I do not think that the London and North Western Act and its schedule really govern a contract to deliver at a through rate at a station not on their line. In such cases the railway company seem to me to be forwarding agents, and not carriers, for so much of the journey as is off their line; but with regard to so much of the transit as is over the rails of the London and North Western Railway Company, the charge for which the railway company may make in cases in which they are the carriers, the schedule to their Act applies, and they cannot get the benefit and privilege of the short distance rate unless they bring themselves within the conditions imposed by clause 11—that is to say, the case must be one in which the transit on the London and North Western Railway does not exceed given distances, in the present case six miles. But when you come to measure the distance in cases where merchandise is conveyed by the company partly on the railway and partly on the railway of any other company, the railway and the railway of such other company shall, for the purpose of reckoning such short distance, be considered as one railway—that is to say, you are to include in what is measured, not only the railway of the London and North Western Company, but also the railway of any other company over which such merchandise is conveyed by the London and North Western Company.

Now in the argument of the counsel for the railway company it is said that "conveyance" means physical conveyance, and not a mere contract of carriage, and it is pointed out that the second company is under no obligation to admit the engines of the first company on to its line, and is entitled to do the haulage itself, and it is argued that if it exercises its rights of doing haulage it necessarily incurs all those expenses which a recommencement of conveyance involves, and for those expenses it must be paid. In my judgment the proviso has no application excepting in cases where there is a conveyance or carriage, to use the expression of Bigham J., by the London and North Western Railway Company over two railways. Now whether there has been such a conveyance or carriage by the London and North Western Railway is a question of fact and a very

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complex question. It is material, no doubt, in answering the question to take into consideration the contract of carriage, but to my mind this is not conclusive. It is material, again, to take into consideration questions such as questions of haulage, questions of station terminals, questions of ownership of rails, and questions of marshalling the trucks and of the provision of trucks. Any of these may be material in particular cases for the determination of the question which company conveys or which company carries. These questions are not material to the question of measurement, but the proviso which defines the items of measurement only applies in cases where there is conveyance or carriage by the London and North Western Railway. Whether there is in fact such a conveyance or carriage is a question pre-eminently for the Railway Commissioners, and I am not prepared to differ from their conclusion. The result is that all three questions in the special case must be answered in favour of the railway company. The proper thing to be done, in my opinion, is for the coal traders to ask the Railway Commissioners for and obtain from them a through rate. If this is done, the hardship which must arise in cases where the conveyance is in fact by the railway receiving the merchandise for conveyance (as distinguished from forwarding) to a point off their system would disappear; I mean the hardship arising from the companies off the London and North Western system being entitled to charge the London and North Western a rate which the London and North Western cannot charge the consignor. I have not attempted in this judgment to discuss cases where the London and North Western Company may happen to have running powers or be joint owners. In my opinion, in this case the appeal should be dismissed with costs.

FLETCHER MOULTON L.J. read the following judgment:—I have come to the same conclusion—namely, that in the first two cases the rate chargeable is the sum of the two short distance charges of the two railways concerned, but that in the third case the short distance charge of the Lancashire and Yorkshire Railway Company must be added to the ordinary mileage charge for the distance that the traffic passes over the

London and North Western line in order to ascertain the total fare chargeable.

The first thing to bear in mind is that we are not dealing in the present case with a through rate fixed by the authority of the Railway Commissioners, but with the question of what rate the London and North Western Railway Company is entitled to charge for the total carriage over its lines and those of the Lancashire and Yorkshire Company, when no interference with the statutory maxima has taken place. In such a case the total rate chargeable for the whole transit is the sum of the rates chargeable by each railway company for that part of the conveyance which is over its lines. No one of the component railways under such circumstances can be required to carry traffic for less than its maximum rates, whether the traffic be delivered to it by a trader or by another railway company, or by another railway company acting on behalf of a trader. For simplicity's sake I will, in the first instance, consider the present case as one in which each railway carries the traffic over its own lines, and neglect the incident that the exchange takes place at Bamfurlong sidings instead of at Wigan. For reasons I shall give I think this fact is immaterial, and by taking the more ordinary and normal circumstances of traffic over a succession of railways we put ourselves into a better position for construing the provisions of the Acts. The Lancashire and Yorkshire Railway would then be in the position of a railway conveying traffic from Wigan Junction to Pagefield siding, a distance of one mile nineteen chains. For this it would be undoubtedly entitled to charge 6*d*., being the rate chargeable for six miles upon that line. This is, in my opinion, incontestable. The case does not come within the proviso to clause 11 of the Lancashire and Yorkshire Railway Provisional Order, for the distance through which the traffic is conveyed by the Lancashire and Yorkshire Railway Company is only one mile nineteen chains, whatever meaning be ascribed to the word "conveyed," and this is entirely over its own lines, and not over the lines of any other railway company. It follows, therefore, that the provisions of the earlier part of the clause apply, and the Lancashire and Yorkshire Railway Company is entitled to charge 6*d*. for the conveyance, and therefore the

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London and North Western Railway Company is entitled to charge 6*d.* in its through fare for this part of the transit.

I will next consider the question how much the London and North Western Railway Company is entitled to charge for the transit over its own lines. No question can arise with regard to the two cases of Edge Green siding to Pagefield siding, and Golborne Colliery siding to Pagefield siding, inasmuch as in each of these cases the total distance conveyed is less than six miles. The London and North Western Railway Company is entitled to charge its minimum of six miles for each of these transits, so far as they are upon its own lines, for it must be remembered that clause 11 of the London and North Western Provisional Order relates solely to the rates that can be charged in respect of the conveyance over the lines of that railway. This is rendered clear by clause 4 of the provisional order, which enacts, so far as is material to the present case, that the maximum rates and charges which the London and North Western Railway Company shall be entitled to charge and make in respect of the merchandise traffic on its railways shall be the rates and charges specified in the schedule annexed to the order, and shall be subject to the classification, regulations, and provisions set forth in the said schedule. The provisions of clause 11 of the schedule apply, therefore, to the charges which may be made for the conveyance of traffic over the London and North Western lines, but to no others; and as the distance over which the traffic passes on the London and North Western Railway in the two cases to which I have referred is unquestionably less than six miles, the proviso cannot take effect, however we construe the word "conveyed," because the total transit is less than six miles. The London and North Western Railway Company is, therefore, entitled to the benefit of clause 11, and can charge as for six miles for the transit over its own lines. A different question arises in the case of the traffic from Earlestown Haydock to Pagefield siding. The distance over the London and North Western Railway to Wigan Junction is seven miles seventy-eight chains, and therefore the London and North Western Railway Company are not entitled to the benefit of clause 11. The total charge in that case, therefore, must not exceed that for

seven miles seventy-eight chains at the rate of 0·95*d.* per mile, together with 6*d.*, the charge in respect of the conveyance over the Lancashire and Yorkshire lines from Wigan to Pagefield siding. As a matter of fact, however, the traffic is conveyed by the London and North Western Railway Company only as far as Bamfurlong sidings, and the Lancashire and Yorkshire Railway Company take it on thence to Pagefield siding. I am of opinion that this, which is by a private arrangement between the railway companies for their own convenience, cannot make any difference in the fare chargeable to the trader to his detriment. Clause 24 of the provisional order of the London and North Western Railway Company entitles the Lancashire and Yorkshire Railway Company to charge for performing on the London and North Western Railway any of the services for which rates or charges are authorized by the schedule the same rates and charges as the company are authorized to make. But it does not authorize them to charge any higher sum. In my opinion this ensures the trader being in the same position with regard to rates and charges, by whomsoever the services are done, unless and so far as the proviso in clause 11 may be affected by the question by whom the services are done. It remains, therefore, to consider the meaning of that proviso.

I am of opinion that the proviso does not apply to cases in which each railway company conveys the traffic over its own lines and no more. By virtue of the reasoning with which I commenced my judgment, each of these railways is unquestionably entitled to make its full charge, because the proviso to clause 11 does not apply to it, with the possible exception of the one which receives the goods and makes the contract. In no sense of the word "conveyed" can any of the other railway companies be said to convey over lines which do not belong to them. But it is contended on behalf of the appellants in this case that this initiating railway must be taken to "convey" the traffic throughout the whole distance because it has undertaken that it shall be so conveyed. I am of opinion that the learned judge below was right in holding that this contention could not be supported. A moment's consideration will shew that it would put the initial company in a most unfair position. Assume, for instance, that

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there are two railways over which the charge per ton per mile is 1*d.*, each of them having, of course, a provisional order in the form which now applies universally to the English railways. Traffic is given to the first railway to carry for four miles over its lines, and then to be delivered to the second railway for a transit of three miles. According to the contention of the appellants, assuming each railway to perform the services upon its own line, the total charge that could be made by the receiving company would be 7*d.*—that is to say, for seven miles at 1*d.* a mile; because the proviso of clause 11 would apply, and would exclude the right to make the short distance charge. Out of this total sum of 7*d.* it must pay 6*d.* to the second company in respect of the conveyance for the three miles, inasmuch as, as I have already pointed out, the second company is entitled to make this charge for traffic conveyed by it for a distance of only three miles by whomsoever the traffic is handed to it. The first company, therefore, would have to content itself with 1*d.* for carrying the traffic over a distance of four miles, a conclusion which is so absurd that it is evident it cannot be the meaning of the proviso. Nor do the words of the proviso countenance such a contention. The word "conveyed" in the earlier part of the clause necessarily means conveyed over the lines to which the provisional order relates, and not to conveyance over other lines, inasmuch as that part of the clause deals with the rates chargeable, which must, by clause 4, be rates in respect of traffic over the lines to which the provisional order refers. But in the proviso the words are "conveyed by the company partly on the railway and partly on the railway of any other company." These words point to the company performing services on other railways, and the consequence of their doing so is that with regard to the rates to which the earlier part of the section relates—that is to say, rates for their own lines—the short distance clause would not be applicable unless the total distance for which they perform the services exceeds six miles. In the illustration I have given, if we assume that the first railway actually conveys over the whole distance, the total charge would be 10*d.*, namely, 6*d.* for the three miles on the second railway and 4*d.* for the four miles on the initial railway. The latter railway would lose its privilege of charging,

according to the short distance rule, for the passage of the traffic over its own lines by reason of the fact that it had actually conveyed a distance of seven miles partly on its own and partly on another railway. But it would not lose the privilege of charging for the three miles on the second railway the same amount as that second railway could have charged had it performed the services itself, a privilege which the initiating railway possesses, not under the provisions of its own provisional order, but under clause 24 of the provisional order of the second company.

BUCKLEY L.J. read the following judgment:—I have found some difficulty in determining in what order I can best deal with the various points raised in this case so as to present in the clearest form the conclusions at which I have arrived. Upon consideration I think it is best to defer until the last the point upon which the Railway Commissioners determined the case, namely, the true meaning of the word "conveyed" in the phrase "conveyed by the company" in the proviso. For brevity and lucidity I shall call the London and North Western Railway Company A and the Lancashire and Yorkshire Railway Company B, and I shall assume that I am reading from the London and North Western Railway Company's rates and charges order. Looking at clause 11 of that order, I find that it consists of an operative part and a proviso. The proviso is that where merchandise is conveyed by company A partly on railway A and partly on railway B, the two railways A and B shall for the purpose of reckoning short distance be considered as one railway. My first observation upon that proviso is that it is addressed to measurement simply, and not to charge. For the purposes of measurement I am to assume, contrary to the fact, that the composite piece of railway is all railway A. That is, I think, the whole effect of that proviso. When it has been applied for the purpose of making that hypothesis the proviso is exhausted. The clause begins with the words "Where merchandise is conveyed for an entire distance," and those words are qualified by the proviso. The proviso operates by way of qualification, but not necessarily qualification by way of exception. It does not follow

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because the proviso contemplates a conveyance partly on A and partly on B that that case is included in the words "entire distance." To explain what I mean I will insert words and make the clause run thus: "Where merchandise is conveyed for an entire distance on railway A which does not exceed six miles the A company may charge for six miles provided that where merchandise is conveyed by company A partly on railway A and partly on railway B, both A and B shall for the purpose of reckoning a short distance be considered as railway A." That is, I think, the meaning of this clause.

The next observation on the clause as a whole is that it is addressed to the matter of charge to be made for conveyance by company A, and, in my judgment, for conveyance over railway A. It has nothing to do with any rate or charge for conveyance over railway B. According to its true construction, I think it is to be read as if next after the words "make the charges for conveyance" were inserted the words "over railway A." The proviso repeats the word "conveyed" which is found in the operative part, but with the addition of the words "by the company." The object of this, I think, is to exclude the case where merchandise is, in fact, carried partly over A and partly over B, but is not conveyed by the A company over those two distances, but, say, by the A company over the A railway and then by the B company over the B railway. It is next necessary to add that clause 24 of the A order contemplates the B company conveying over the A railway, and authorizes it in such a case to make the A charges, and similarly that the B order contemplates the A company conveying over the B railway, and authorizes the A company in such a case to make the B charges. The problem, then, presented is this. Taking the first case in the joint application, the A company conveys, or the A company and the B company convey, (for in this case it does not matter which it is), for three miles and a fraction over the A railway and for one mile and a fraction over the B railway. When carrying over the A railway the conveying company is entitled under the A order, inasmuch as the total of A and B does not exceed six miles, to the benefit of clause 11—or clause 24 coupled with clause 11—of the A order (as the case may be), and to charge as for a hypothetical six miles at

the A rate of charge. Passing on to the B railway, it is then entitled under clause 11—or clause 24 coupled with clause 11—of the B order (as the case may be) to make the B charges as for a hypothetical six miles on the B railway. The argument of the appellants is that the conveying company is not entitled to two, but only to one short distance. Then I ask, Which one is it? There is, according to their contention, a hypothetical six miles on the one railway and not on the other. On which railway is it? And why is it the one more than the other? At what rate is that hypothetical six miles to be calculated, the A rate or the B rate? The contention of the colliery company in the joint application, that the right is to charge six miles and no more at some rate or other for the whole distance, was not argued at the Bar, and is, I think, plainly erroneous. It is conceded that over one or other of the two distances in the first case in paragraph 4 there is a right to charge for six miles upon one or other of the systems, and then to add a further charge upon the real as distinguished from the hypothetical distance over the other system. But the appellants have failed to suggest any reason that it is upon system A rather than system B, or upon system B rather than upon system A, that the hypothetical six miles is to be taken to lie. The fact, I think, is that the conveying company (if it be company A) running upon railway A is entitled under clause 11 of the A order to a short distance charge, and when running upon system B is entitled under clause 24 of the B order to make the same charge as if it were the B company, thus bringing in clause 11 of the B order and again becoming entitled to a short distance charge. And so if the conveying company be the B company, and so again if the conveyance be by both A and B, each conveying for some part of the distance. The second case in paragraph 4 does not differ from the first. For the purpose, therefore, of the first and second cases in paragraph 4, it seems to me that the London and North Western Railway Company is entitled to two short distance charges, whatever be the true construction of the words "conveyed by the company" in the proviso. The third case is different. There A plus B exceeds six miles, and if the London and North Western is the company which conveys over A plus B, it is not entitled

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to any short distance charge on either railway, for the proviso forbids it. The hypothesis is to be made that the B railway is A railway, and there is then more than six miles run on the A railway.

The Railway Commissioners have held that "conveyed" is equivalent to "actually carried." If this means "hauled," it is definite. If it does not, it seems to me to be no more definite than "conveyed." It leaves me in the complex case in the same difficulty. The head-note of the report treats the decision, and I think rightly, as a decision that "conveyed" means "hauled." This results from the fact that the judgment finds that the Lancashire and Yorkshire Railway Company has "conveyed" over parts of each of the two railways, and the facts of the case state that the act done by that company was haulage. The decision, therefore, is that the merchandise is "conveyed" by the company whose locomotive is at the head of the train. I am unable to agree in this view. The short distance charge is authorized, it is said, and I think truly, for services rendered in cases where the mileage is short. What are the services? The clause to be construed deals not only with cases, such as the present, in which the trucks are owned by the colliery owner, but also with cases in which the trucks may be owned by the railway company. The service of conveyance includes the supply of the locomotive with its equipment of men and materials, the supply of the rolling stock, the use of the permanent way, the service of signals, the service of the staff—for instance, in attaching and detaching the trucks, working the signals, and so on—and all the other equipment of a railway undertaking. As regards the permanent way, I exclude that from consideration by reason of the fact that clause 24 speaks of one railway company "conveying merchandise on the railway" of another, thus contemplating that the person who conveys may not own the permanent way. The same may be said of the signals, but it cannot be said of the locomotive, the rolling stock, or the service of the staff. Suppose a case of a train composed of trucks of the A company drawn by the locomotive of the B company over the railway of the A company. Who has rendered the service of conveyance? Both are contributing to it. A gives

the rolling stock, B gives the locomotive and its equipment of men and materials, and A gives the services of the staff. Under s. 25 of the Railway and Canal Traffic Act, 1888, one railway company is at the request of another to receive and forward traffic. If company A, therefore, takes a through rate over railway A and railway B, it has the means of sending it through by requesting company B to carry it. There is, therefore, no difficulty in company A conveying over railway B either by making use of clause 24 of the B order and doing the service itself, or by procuring it to be done by company B on its behalf. The words in the proviso, "conveyed by the company," mean, I think, not to leave open the very difficult question of who in a complex case is the company which can be said to be conveying—that is to say, whether it is the owner of the locomotive or the owner of the truck, and so on—but points to the company who under the contract of carriage is bound towards the customer to carry the goods, and who is entitled to look to the customer for payment of the carriage. In the third case, therefore, in paragraph 4, the London and North Western Railway Company, as it appears to me, are the persons conveying the merchandise, because they entered into the contract of carriage, and none the less because over some part of their own system and over some part of the Lancashire and Yorkshire system the traction or haulage is done by a Lancashire and Yorkshire engine. Applying, then, clause 11 to this case, I find that the London and North Western Railway Company are conveying the merchandise partly on railway A and partly on railway B. Under these circumstances the proviso tells me that for the purposes of measurement I must say that the permanent way of the Lancashire and Yorkshire Company is notionally the permanent way of the London and North Western Railway Company. That being so, there is notionally a conveyance over the London and North Western Railway for more than six miles, and there is no right to a short distance charge. The injustice which would seem to result from this consideration is, I think, apparent rather than real. In fixing their through rate company A, if acting voluntarily, would, I think, be well

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advised to fix such a rate as under the short distance circumstances is fair. If it went to the Commissioners to fix the through rate, they would, I conceive, properly take the short distance carriage on the London and North Western system into consideration. The result would be that such a rate would in either case be fixed, as by apportioning it between the short distance of company A and the long distance of company B would give to company A a fair advantage having regard to the short distance travelled on their system. In my opinion the order below ought to be discharged, and there should be substituted declarations that in the first two cases mentioned in paragraph 4 the London and North Western Railway Company are entitled to two short distance charges, and that in the third case they are not entitled to any short distance charge, but, inasmuch as the majority of the Court are not of that opinion, of course that will not be the order. I only wish to add a suggestion that simply to dismiss the appeal would not work it out, and that there ought to be a declaration to give effect to the views of the majority of the Court.

Appeal dismissed: Order of Railway and Canal Commission varied. (1)

Solicitors for the colliery owners: *Rawle, Johnstone & Co., for T. Ratcliffe Ellis, Wigan.*

Solicitor for the London and North Western Railway Company: *C. de J. Andrewes.*

Solicitor for the Lancashire and Yorkshire Railway Company: *A. de C. Parmiter, Manchester.*

(1) The order of the Court of Appeal was in these terms: "It is ordered that this appeal be dismissed, but that the declaration of the Court of Railway and Canal Commission be varied by adding thereto after the words 'contracted to be carried' the following words, 'and that for the purpose of ascertaining the true construction of the word "conveyed" regard is to be had to all the circumstances of the case and to all services rendered, including (inter alia) haulage."

W. J. B.

ATTORNEY-GENERAL *v.* DUKE OF RICHMOND, GORDON AND LENNOX (No. 1).

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July 8, 9, 10, 11, 30.

Revenue — Estate Duty — Allowance — Incumbrances — Bona fide Creation — Consideration — "Wholly for the Deceased's own Use and Benefit" — Finance Act, 1894 (57 & 58 *Vict.* c. 30), *s.* 7, *sub-s.* 1 (*a*).

By a deed of entail made in 1872 certain estates in Scotland, of which the defendant's father was then heir of entail and in possession, were re-entailed, the order of succession after the defendant's father being first the defendant, then the defendant's son, and then certain other persons. In 1897 the defendant's father petitioned the Scotch Court of Session under the Scotch Entail Acts to approve of an instrument of disentail without the consent of the defendant or his son. Their interests were duly valued respectively at 415,000*l.* and 287,000*l.*, for which sums the defendant's father executed two bonds in their favour, and the Court made a decree on the petition approving an instrument of disentail, which was duly recorded and registered. By an assignation and deed of trust the defendant and his son assigned the sums secured by the bonds and the interest thereon to trustees to pay the income to the defendant for life and afterwards to his son. In 1898 the defendant's father made a revocable mortis causa disposition of the estates by which they were entailed after his death on the defendant, his son, and other persons. No interest was paid in money on the bonds by the defendant's father, but accounts were stated from time to time between the defendant and his father, in which the latter was debited with the amount due for interest on the bonds and credited with certain voluntary payments made by him to the defendant, shewing a balance due to the defendant, for which his father gave further bonds to the defendant amounting to 88,314*l.* The main motive of the defendant's father in thus dealing with the estates was to lessen the amount of estate duty payable on his death, but all the deeds and instruments, including the bonds, were genuine instruments intended to have their full operation without any reservation. The defendant's father died in 1903, and the defendant claimed to deduct from the capital value of the estates passing on the death, which amounted to 1,102,221*l.*, for the purpose of estate duty certain debts and incumbrances, including the bonds for 415,000*l.* and 287,000*l.* and 88,314*l.*, leaving an excess of debts and incumbrances over the value of the estates of 47,092*l.* :—

Held, that the bonds were incumbrances created bona fide for full consideration in money's worth wholly for the deceased's own use and benefit within s. 7, sub-s. 1 (*a*), of the Finance Act, 1894, and that the defendant was therefore entitled to make the deduction claimed.

Information by the Attorney-General.

The informant prayed that it might be declared that in the

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assessment of the "Gordon Richmond estates" for the purposes of estate duty under the Finance Act, 1894, upon the death of the late Duke of Richmond, Gordon and Lennox, deductions ought not to be allowed for the sums comprised in two bonds, for 415,000*l.* and 287,000*l.* respectively, given by the late Duke to the defendant and to his son, nor for the sums comprised in certain further bonds, amounting to 88,314*l.* 8*s.* 10*d.*, given by the late Duke to the defendant, the same not being debts or incumbrances incurred or created by the late Duke bona fide for full consideration in money or money's worth wholly for the use and benefit of the late Duke within the meaning of s. 7, sub-s. 1 (*a*), of the Finance Act, 1894. (1)

The following statement of facts is taken from the judgment:—"In the year 1872 Henry Gordon Lennox, Duke of Richmond, whom I shall call the late Duke, was heir of entail and enfeft and in possession of the Gordon Richmond estates in Scotland, his son, the defendant, then Earl of March and now the present Duke of Richmond, being the next heir, and the latter having a son, Lord Settrington, then aged two years. By a deed of entail, dated August 7 and 9, 1872, afterwards duly recorded and registered, the late Duke and the defendant, under a power then vested in them, re-entailed and resettled the said estates. Under the entail the order of succession after the late duke was as follows: (*a*) The defendant; (*b*) Lord Settrington; (*c*) the heirs male of Lord Settrington's body; (*d*) the other heirs male of the body of the defendant; (*e*) the other heirs male of the body of the late Duke; (*f*) the heirs female of the body of the present Duke; (*g*) the other heirs female of the body of the late Duke; (*h*) the nearest heirs whomsoever of the late Duke; (*i*) the nearest heirs and assigns whomsoever of the defendant. This

(1) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7, sub-s. 1: "In determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made—

(*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest."

deed also contained a proviso and declaration enabling the late Duke and the defendant jointly at any time of their joint lives, and after the death of one of them for the survivor jointly with Lord Settrington, if of the age of twenty-five years, to deal with and dispose of the estates as if they were held in fee simple free from any fetter of entail. This power was exercised by the late Duke and the defendant jointly on two occasions—once in March, 1895, for the purpose of enabling the late Duke to borrow 25,000*l.* on the security of the estate, and on another occasion in May, 1895, to enable him to borrow a further 10,000*l.* By the same deed of entail an annuity of 3000*l.* was made payable to the defendant by the late Duke during his life-time. In 1897 the late Duke was still alive and was seventy-nine years of age, and Lord Settrington was twenty-six and married. On April 12 in that year the late Duke presented a petition to the Court of Session in Scotland, asking the Court, on the fulfilment by him of certain conditions, to approve of an instrument of disentail. This procedure was authorized by a series of Scotch Acts, called the Entail Acts, the most important Acts being 11 & 12 Vict. c. 36 (1848), 38 & 39 Vict. c. 61 (1875), and 45 & 46 Vict. c. 53 (1882), and by virtue of these Acts the late Duke, as heir of entail enfeft and in possession of the estates, was entitled to disentail them with the consent of the defendant and Lord Settrington, or without their consent, by paying into a bank or giving proper security over the estates for the value in money of their respective expectancies or interests in the entailed estates, such values being ascertained by the Court. The proper procedure was followed by the late Duke, and the interest of the defendant was valued by the Court at 415,000*l.*, and that of Lord Settrington at 287,000*l.* On October 6, 1897, the late Duke executed a bond and disposition in security in proper form in favour of the defendant for 415,000*l.*, and another in favour of Lord Settrington for 287,000*l.*, which were duly registered on October 19, and on October 20 the Court made a decree on the petition approving an instrument of disentail which had been executed by the Duke on June 19, and ordering the keeper of the Register of Tailzies to record the same in the said register. The instrument of disentail was accordingly recorded and registered

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on November 19, and by means of this instrument on the same being duly recorded and registered the late Duke became owner in fee of the estates subject to the old incumbrances and also to the new incumbrances of 415,000*l.* and 287,000*l.* By an assignation and deed of trust dated November 11 and 15, 1897, and recorded on November 18, 1897, the defendant and Lord Settrington, in pursuance of an agreement recited to have been made between them, assigned the sums of 415,000*l.* and 287,000*l.* secured to them by the before-mentioned bonds and dispositions and all interest thereon to trustees upon trust to pay the income to the defendant for life and after his death to Lord Settrington, with divers limitations over. By a bond and assignation in security the defendant on November 24 charged his interest in the incomes of the bonds for 415,000*l.* and 287,000*l.* and other securities, with the repayment of 4500*l.* borrowed by him from the trustees of one Madgwick Spicer Davidson, and by a similar bond, also dated November 24, 1897, gave a further charge on his interest in the said incomes for 1500*l.* borrowed by him from a Mrs. Croxall. Both these bonds were duly registered. On December 1, 1897, the late Duke executed a codicil to his will of 1893, wherein he stated that it was his intention to execute a deed of entail of his Gordon Richmond estates in favour of the defendant and other heirs, and then declared that such estates should be entirely excluded from the operation of his will. On April 20, 1898, the late Duke made a mortis causa disposition and deed of entail of the Gordon Richmond estates, whereby he conveyed and disponed them from his death—(*a*) to the defendant; (*b*) to Lord Settrington; (*c*) to the heirs male of the body of Lord Settrington; (*d*) to the other heirs male of the body of the defendant; (*e*) to the other heirs male of the body of the late Duke; (*f*) to the heirs female of the body of Lord Settrington; (*g*) to the other heirs female of the body of the defendant; (*h*) to the other heirs female of the body of the late Duke. This disposition was different in several particulars from the deed of entail of 1872, but the substantial difference was that the estates were tied up for one further generation. In 1899 and again in 1903 the late Duke charged the estates subject to all the incumbrances, including those of

415,000*l.* and 287,000*l.*, to secure two sums of 6000*l.* and 5000*l.* borrowed by him. In the latter the defendant joined, at the late Duke's request, for the purpose of giving his consent to postpone the securities held by him in respect of interest on the two bonds. The interest on the two bonds of 415,000*l.* and 287,000*l.* was payable to the defendant under the assignation and deed of trust of November, 1897, and a mandate for the trustees authorizing payment to the defendant. It was not paid in cash by the late Duke, but on January 24, 1899, an account was stated and signed between him and the defendant. This account shewed, on the one side, the interest due on the two bonds, and, on the other, certain voluntary payments which the late Duke had been in the habit of making for many years prior to 1897 to or for the benefit of the defendant, and the balance brought out as due to the defendant as at November 11, 1898, was 18,476*l.* 3*s.* 5*d.*, and on February 2 the late Duke executed a bond and assignation in security for that amount in favour of the defendant. This bond was duly registered on February 8, 1899. Similar accounts were stated and similar bonds were given each year down to the death of the late Duke and duly registered. The total amounts of those bonds amounted to 88,314*l.* 8*s.* 10*d.* The late Duke died on September 27, 1903. After his death the defendant delivered to the Commissioners of Inland Revenue an account of the Gordon Richmond estates as passing on the death of the late Duke for estate duty purposes. On the credit side of these accounts the capital value of the estates was shewn as 1,102,221*l.* 13*s.* 9*d.*, and on the debit side deductions for debts and incumbrances amounted to 1,149,314*l.* 8*s.* 10*d.*, leaving an excess of debts and incumbrances over the value of the property of 47,092*l.* 15*s.* 1*d.* These deductions included the bonds for 415,000*l.* and 287,000*l.*, and the further bonds amounting to 88,314*l.* 8*s.* 10*d.*

Two witnesses were called for the defence, Mr. Clyde, K.C., of the Scottish Bar, and the defendant. The substance of their evidence is stated in the judgment.

Sir J. Lawson Walton, A.-G., Sir R. B. Finlay, K.C., and *Vaughan Hawkins*, for the Crown. The question is whether the bonds are incumbrances created bona fide for full consideration

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in money or money's worth wholly for the late Duke's own use and benefit within s. 7, sub-s. 1 (*a*), of the Finance Act, 1894. The onus is on the defendant to prove that the conditions of the section have been fulfilled. The only inference that can be drawn from the facts is that the bonds were not bona fide incumbrances, but that the sole object of the late Duke in thus dealing with his estates was to diminish the amount of the estate duty which would be payable on his death. Unless this was the object, there was no necessity for the disentailing proceedings in the Scotch Courts, for there was power under the settlement of 1872 for the late Duke to disentail with the consent of the defendant. But in order to come within s. 7, it was necessary that the incumbrance should be created solely for the late Duke's benefit, and the concurrence of the defendant would have shewn that it was for his benefit also, and thus the object of the creation of the incumbrance would have been defeated. All the facts shew that the legal proceedings and the subsequent deeds and dispositions, though apparently valid, were not intended to be operative, and that there was an arrangement or understanding that the status quo should not be disturbed. Neither the defendant nor his son had any independent advice, for the same solicitors acted for all parties. The interest of the son was valued as if it were an indefeasible interest, in order to swell the amount of the incumbrances so as to swamp the capital value of the estates, whereas in fact under the settlement of 1872 Lord Settrington's interest could have been defeated. Lord Settrington, without independent advice, assigned the interest due to him on his bond to the defendant. No interest was in fact ever paid. Within a fortnight of the decree of the Court of Session the late Duke executed a codicil putting it on record that he intended to execute a deed of entail, and he did so in 1898 by the mortis causa disposition of the estates, which revived the entail practically in the same form as it had existed under the settlement of 1872. This deed was no doubt revocable, but it is obvious from the terms of the codicil that the late Duke never had any intention of revoking it. A transaction of this nature, the sole object of which was to evade the liability to

estate duty, cannot be said to be a bona fide transaction. Further, the incumbrances were not created for the deceased's own use and benefit. It is difficult to see how he got any benefit at all by the creation of these incumbrances, but it is quite clear that the transaction was for the benefit of his successors, because it was to their interest that the estates should escape the payment of estate duty. The defendant, therefore, cannot bring the transaction within s. 7, and is not entitled to deduct the amount of the bonds from the capital value of the estates. [They referred to *Alexander* v. *Newman.* (1)]

Danckwerts, *K.C.*, *Buckmaster*, *K.C.*, and *Austen-Cartmell*, for the defendant. The evidence shews that the proceedings in the Court of Session were perfectly legal and valid: Entail Act, 1685; Entail Amendment Act, 1848 (11 & 12 Vict. c. 36); Entail Amendment Act, 1868 (31 & 32 Vict. c. 84); Entail (Scotland) Act, 1882 (45 & 46 Vict. c. 53); *Leny* v. *Leny* (2); *Macgregor* v. *Gordon* (3); *Moubray* v. *Moubray* (4); *Farquharson* v. *Blair* (5); *Macleod* v. *Smith.* (6) The deeds were genuine deeds free from any secret understanding or arrangement, legal or otherwise. From its inception to its completion the transaction was a legitimate, bona fide, honest transaction. It is beside the question to speculate as to what was the late Duke's motive, for when once it is established that the transaction was a genuine one, and the information does not even allege that the bonds were sham bonds, the question of motive becomes immaterial; and assuming that the late Duke's sole motive, or his main motive, was to evade the death duty, that does not invalidate the transaction: *Inland Revenue Commissioners* v. *Angus* (7); *Bullivant* v. *Attorney-General for Victoria* (8); *Simms* v. *Registrar of Probates* (9); *Attorney-General* v. *Beech* (10); *Cowley* v. *Inland Revenue Commissioners* (11); *Attorney-General* v. *Lethbridge.* (12) The late Duke's real motive, however, was to acquire uncontrolled power over the estates, which he was

(1) (1846) 2 C. B. 122.
(2) (1860) 22 D. 1272.
(3) (1864) 3 Macph. 148.
(4) (1895) 22 R. 801.
(5) (1886) 14 R. 231.
(6) (1851) 13 D. 575.
(7) (1889) 23 Q. B. D. 579.
(8) [1901] A. C. 196.
(9) [1900] A. C. 323.
(10) [1899] A. C. 53.
(11) [1899] A. C. 198.
(12) [1907] A. C. 19.

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entitled to do under the Scotch law on paying or securing to his two immediate successors the value of their interests, so as to enable him to make such provision for the other members of his family as he might consider desirable, or to continue the entail for a longer period than was provided for by the settlement of 1872, and this was in fact carried out by the mortis causa disposition. These bonds were not only genuine bonds, but were in fact so treated by the defendant, as is shewn by the fact that he charged his interest in the incomes of the bonds with the repayment of two loans. The argument that the incumbrance must be created for the sole benefit of the deceased is based on a misreading of s. 7. Every incumbrance must be for the benefit of both parties, but what the section requires is that the money or money's worth should be wholly for the deceased's own use and benefit. Here there was a purchase on either side for money or money's worth. The defendant and his son got the value of their interests secured, and the late Duke obtained for his sole use unfettered control over the estates free from the interests of the defendant and his son. If the late Duke, instead of giving bonds, had raised the necessary money by a mortgage to a third person and had paid over the money so raised to the defendant and his son, the position would have been exactly the same, but it could not then have been contended that the transaction did not come within s. 7, sub-s. 1 (*a*). There is another answer to the claim of the Crown. The estate which passed to the defendant on the death of the late Duke was not an estate subject to an incumbrance. Under the bonds there was a clear and absolute conveyance of the estates subject to redemption, and that which passed to the defendant under the mortis causa disposition was merely the equity of redemption, or the reversion, as it is called in Scotland, and the duty is only payable on the value of that equity of redemption: *Cowley* v. *Inland Revenue Commissioners* (1); *Attorney-General* v. *Montagu*. (2) If the estate which passes is the equity of redemption, it is not an estate subject to incumbrances.

[BRAY J. Does not this argument prevent s. 7, sub-s. 1, from having any application?]

(1) [1899] A. C. 198. (2) [1904] A. C. 316.

No; it applies to all cases of incumbrances which do not pass to the incumbrancer a fee or an estate, such as a rent-charge or a mere equitable charge. [*Berry* v. *Gaukroger* (1) and *Rishton* v. *Haslingden Corporation* (2) were also referred to.]

Sir J. Lawson Walton, A.-G., and *Vaughan Hawkins*, in reply. It is not disputed that a person may deal with his property in his life-time in such a way as to diminish the amount of the estate duty payable at his death, and that the motive inducing any particular transaction is immaterial, unless the transaction when completed comes within the language of the Act; but in order to get the benefit of s. 7, sub-s. 1 (*a*), the transaction must be bona fide, not merely not mala fide, but bona fide in the sense that the object of creating the incumbrance was to obtain the consideration for which it was given. There is no evidence here that the late Duke carried out this transaction for his own exclusive benefit. It is true that he got the estate without the entail, but it is obvious that he did not wish the estate to do otherwise than pass in tail with the title. His intention was to create a state of things which would have no real operation except to diminish the amount of the estate duty, and, that being so, the incumbrances were not created bona fide for full consideration in money or money's worth. The argument that the only estate which passed on the death was the equity of redemption is based on a misconception of the provisions of the Act. The Act deals with both settled and unsettled property, and the difficulty arises from the fact that the Act applies the same language to both classes of cases. In cases of settled property, of which *Cowley* v. *Inland Revenue Commissioners* (3) and *Attorney-General* v. *Montagu* (4) are examples, the duty is only payable on the beneficial interest to which a person succeeds under the settlement. In the case of unsettled, or what may be called free, property the Act imposes the tax on everything which the deceased leaves subject to such deductions as the Act allows, and it is for that purpose that the provisions of s. 7 become necessary. In this case there was no settlement. The defendant succeeded to the tenancy in fee under the mortis causa disposition subject to incumbrances, and

(1) [1903] 2 Ch. 116.
(2) [1898] 1 Q. B. 294.
(3) [1899] A. C. 198.
(4) [1904] A. C. 316.

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if this case does not come within s. 7, that section can have no operation at all. [*Casborne* v. *Scarfe* (1) and *Attorney-General* v. *Dobree* (2) were referred to.]

Cur. adv. vult.

July 30. BRAY J. read the following judgment:—In this case the Crown claimed a declaration that in the assessment of certain estates in Scotland, called the Gordon Richmond estates, for the purposes of estate duty under the Finance Act, 1894, upon the death of Charles Henry Gordon Lennox, the late Duke of Richmond, deductions ought not to be allowed for the sums of 415,000*l.* and 287,000*l.* comprised in certain bonds respectively given to the defendant, the present Duke, and to his son, formerly Baron Settrington, but now Earl of March, nor for the sum of 88,314*l.* 8*s.* 10*d.* comprised in certain other bonds given to the defendant, the same not being debts or incumbrances incurred or created by the late Duke bona fide for full consideration in money or money's worth wholly for the use and benefit of the late Duke within the meaning of s. 7, sub-s. 1 (*a*), of the Finance Act, 1894. The defendant's answer to this claim was twofold: First, that the said sums were debts and incumbrances so incurred or created for full consideration in money or money's worth wholly for the use and benefit of the late Duke within the meaning of the said section; and, secondly, that this section did not apply to the case, and that the estate which passed on the death of the late Duke was an estate subject to these incumbrances. Important and difficult questions were thus raised, and I thought it better to reserve my judgment and put my reasons in writing. Many of the facts were undisputed, and I will state them first. [The learned judge stated the facts as set out above, and continued as follows:—] Almost all of the documents above referred to were put in by the Attorney-General, and he contended that it was for the defendant to establish that these were debts and incumbrances created by the late Duke bona fide for full consideration in money or money's worth wholly for his use and benefit, for which allowance had to be made under s. 7, sub-s. 1 (*a*), of the Finance Act. I was of

(1) (1737) 1 Atk. 603. (2) [1900] 1 Q. B. 442.

opinion that the onus lay on the defendant to prove this, at all events in the first instance, and Mr. Danckwerts thereupon called witnesses on behalf of the defendant.

The first witness called was Mr. Clyde, an advocate of the Scottish Bar, holding the rank of King's Counsel and Solicitor-General in the time of the late Government. His evidence was given with admirable lucidity, and helped to remove many of the difficulties I felt in dealing with a question so largely dependent upon Scotch law. His evidence was not really disputed by the Attorney-General, and I have accepted it as accurate in every respect. The important parts of his evidence were to the following effect: That by the Scotch statute of 1685, chapter 22, it was permitted to entail estates, and, once the estate was properly tailzied, it was impossible to get rid of the entail, but when the destination was the same as the common law the entail ceased, and the last heir would hold in fee simple, and he illustrated this by saying that in the succession under the deed of entail for 1872 the last heir female under (*g*) would succeed in fee simple; that the first power to disentail Scotch estates was given by the Scotch Act of 1848, and this Act was followed by further Acts in 1875 and 1882; under the Act of 1848 Lord Settrington's son, on attaining twenty-one, could have broken the entail created by the deed of 1872 without any consent, and the effect of the mortis causa entail of the late Duke was to tie up the estate for a further generation; that the effect of the Act of 1848 and the subsequent Acts, including the Act of 1882, was to enable an heir of entail in the position of the late Duke to break the entail without any consents on his paying or giving proper security on the estate for the sum ascertained by the Court to be the values of the expectancies of the two next heirs, the present Duke and his son, Lord Settrington; that the steps taken by the late Duke to break the entail were in all respects regular, and could not have been resisted by the defendant or Lord Settrington; that the values of their expectancies had been properly ascertained by the Court through an independent valuer, and the instrument of disentail, when registered, vested the estates in the late Duke in fee simple, subject to the incumbrances; that all the bonds and deeds were in the usual form; and that

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the mortis causa entail was a purely testamentary document revocable like any will, and having no operation at all till after the death of the late Duke.

The only other witness called on behalf of the defendant was the defendant himself, the present Duke of Richmond. It was impossible to listen to his evidence, as he gave it, without being convinced that he was telling the whole truth, and I accept his evidence as being absolutely true. It is not necessary for me to refer to it in detail. It is printed in the shorthand notes. As the result of his evidence I find as facts: (1.) That all the deeds and documents signed from 1897 onwards, including the bonds claimed as incumbrances, were genuine instruments intended to have their full operation, without any reservation of any kind, secret or otherwise; (2.) that there was no such arrangement or even understanding, such as suggested in paragraphs 4 and 4 (*a*) of the amended information; (3.) that it was the intention of the late Duke to bar the entail, and to make himself owner in fee simple of the Gordon Richmond estates, subject to the incumbrances, including the bonds, but that the motive which mainly actuated him in taking the steps which he did for that purpose was that he would thereby diminish his estate and lessen the estate duty payable on his death. As regards the first finding, I rely not only on the evidence of the defendant, but also on the fact that there were several transactions entered into with third parties on the footing that these deeds and documents were genuine—I refer to the deeds of February 2, 1899, and July 16, 1903, executed by the late Duke, and to the following deeds executed by the defendant, November 24, 1897, November 24, 1897, December 15, 1903, December 15, 1903, and July 2, 1907—and also on the fact that all the documents, except the testamentary documents, were registered within a few days of their execution in public registers where they could be seen by any one.

As regards my second finding, in the absence of any evidence I might possibly have been able to infer such an arrangement or understanding, but the defendant must necessarily have been a party to it, and I accept without reservation his denial that there was anything of the kind. It was suggested to me in argument by the Attorney-General and by Sir Robert Finlay that there

might have been such a scheme in the minds of Messrs. Brodie, the solicitors who acted for all parties. I am satisfied that the defendant never gave any instructions to Messrs. Brodie which would justify them in forming such a scheme, or would authorize them to bind him to any such scheme, and I can find no evidence whatever of any such scheme. The defendant, no doubt, instructed them to protect his interest, but he was advised by them, and rightly advised, that he could not resist the proceedings taken by his father to bar the entail, and they protected his interests by seeing that the bonds executed by the late Duke were valid and binding; and the settlement of the money represented by the two bonds of 415,000*l.* and 287,000*l.* by the assignation and deed of trust was not done at the suggestion of the late Duke, but was arranged between the defendant and Lord Settrington on the advice of Messrs. Brodie acting as his and Lord Settrington's solicitors. It was strongly pressed on me that it was a suspicious fact that the same solicitors should have been acting for all parties if their interests were really distinct and there had been no such arrangement or understanding as suggested; and, further, that the result of all these deeds and documents was to leave matters in very much the same position as they stood before the petition was presented by the late Duke, except that the estates were largely incumbered by the creation of these incumbrances, and that no moneys were paid by way of interest except what had been paid before. No doubt these were matters to be considered and weighed by me, and I have done so, but they have not prevented my coming to the clear conclusion that there was no such arrangement or understanding as suggested.

As regards the third finding, the defendant admitted in his evidence that the only reason given by the late Duke to him for taking proceedings to bar the entail was that he wanted to diminish the capital value of his estate, and so lessen the estate duty. It does not follow from this that it was the late Duke's only motive, but I think it is fair to infer that this was his main motive, and that he would not have taken these proceedings but for his desire to lessen the estate duty. At the same time I think I ought to infer, and I do infer, that the late Duke intended to bar the entail and to reserve to himself the right of dealing with

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the estates as he thought fit during his life-time. No doubt there never was in his mind any intention to disinherit his son. There was no reason why he should have such an intention. The defendant had given him no reason for supposing that he would do otherwise than deal properly and carefully with the estates when he was in possession, but the late Duke took advantage of the opportunity that he had from being owner in fee simple to tie them down as strictly as he could, and by doing this by means of a donatio mortis causa he reserved till the last moment the power of altering the succession.

The question I have now to consider is whether, having regard to the facts as admitted and as found by me, the defendant has proved that the incumbrances were created by the late Duke bona fide for full consideration in money or money's worth wholly for his use and benefit. What is the meaning of bona fide? In my opinion motive has nothing to do with it. In coming to a conclusion whether these were real deeds intended to have a real operation and creating real incumbrances, one of the elements for consideration may be motive, but once it is found that they were real incumbrances, I think the motive which actuated the late Duke in creating them is immaterial. I think that is clearly shewn by the following cases cited to me in argument: *Inland Revenue Commissioners* v. *Angus* (1); *Bullivant* v. *Attorney-General for Victoria* (2); *Simms* v. *Registrar of Probates*. (3) In the two last of these cases the statutes under consideration provided in effect that if a person made any conveyance, assignment, gift, &c., with intent to evade payment of duty, the duty should be paid as if the conveyance, &c., had never been made, yet the Court held in both those cases that to make the duty payable there must be some secret or covinous arrangement, or the deeds must be colourable. Lord Halsbury in *Bullivant* v. *Attorney-General for Victoria* (4) says: "If the fact were merely that the person did execute voluntary deeds, the effect whereof was that the tax never fell upon the property at all, I do not know that there is any offence in that either in Victoria or in this country. People are not bound to continue in the same condition of things

(1) 23 Q. B. D. 579.
(2) [1901] A. C. 196.
(3) [1900] A. C. 323.
(4) [1901] A. C. 196, at p. 202.

either as regards their direct or indirect taxation which will render either the consumption of articles in the one case or the property they have in the other always liable to the tax, and I decline to believe that the Colony has made such an enactment until it is established that that is the enactment which they have made." How can I then construe "bona fide" as meaning without any intent to avoid payment of duty? The words "bona fide" are found in s. 2, sub-s. 3, of this Act, "bona fide assumed"; and in s. 3, sub-s. 1, "bona fide purchase." They are also found in other taxing Acts, and in each case the object of inserting them is, as it seems to me, to provide that the transaction shall be a real and genuine transaction intended to have full and real operation without any secret or covinous arrangement or reservation; and, as I have found that all the deeds and documents here were genuine instruments intended to have their full operation without any reservation of any kind, secret or otherwise, I must find, as I do find, that those incumbrances were created bona fide. It seems to me immaterial to consider whether these words "bona fide" apply to the rest of the words in the sub-section (it may be that they do), because I think that in any case I am bound to find that the full consideration in money or money's worth must be a real one, and must be really wholly for the use and benefit of the person creating the incumbrance in order to bring the incumbrance within the section.

The next point is, Were they created for full consideration in money or money's worth? The consideration to the late Duke here was the obtaining the fee simple in the estates in lieu of an interest which would cease at his death, by means of barring the entail. The statutes provided the conditions under which alone the entail could be barred. It could, of course, have been done with the consents of the defendant and Lord Settrington, or by the defendant joining the late Duke in exercising the joint power reserved to them under the deed of 1872; but, as pointed out by Mr. Clyde, it was impossible to suppose that either the defendant or Lord Settrington could have been advised to give such a consent, at all events unless their interests were provided for in the same way as the Court under the statute would provide for them. The statute therefore (s. 13 of the Act of 1882) had to

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be resorted to. The value in money of the expectancies of the defendant and Lord Settrington had to be ascertained by the Court, and then the money value had to be paid in cash or properly secured on the estate. Short of paying cash, which the late Duke had not got, the money had to be secured on the estate; in other words, these incumbrances had to be created. The amounts for which the incumbrances had to be given were fixed by the Court through an independent valuer watched over by a "man of business." How can it be said that full consideration was not given for that which the late Duke desired to have, namely, the fee simple? The Duke wanted to buy out the interests of his son and grandson. There was only one practical way of doing this, namely, by giving these incumbrances. The fee simple in these estates was money's worth.

I come now to what I think is the real point in this case. Was it wholly for the late Duke's use and benefit? Now what is it which must be wholly for his use and benefit? It cannot be the creation of the incumbrances, because that must always be partly for the benefit of the person in whose favour they are created. The lender or the creditor is necessarily benefited by having his loan or debt secured. It seems to me that it must be the money or the money's worth that must be wholly for his use and benefit. That money or money's worth must really go into the pocket of the person who creates the incumbrance, and must be entirely under his own control to deal with it as he likes. I do not think it is permissible to inquire into what he means to do with it when he gets it, or what he does do with it, but he must have the uncontrolled power to do with it as he likes. Sir Robert Finlay said that he should not dispute that an incumbrance created by the borrowing of a large sum which a father intended to give to a daughter on marriage would be a good incumbrance for which allowance would have to be made; and so I think it would be if a husband wanted to borrow money so as to enable him to buy some jewellery to give to his wife. These would be good, because the money or money's worth would go into the pocket of the person creating the incumbrance, and be there under his control to give it or not as he thought fit. If I am right in so construing the statute, the money

or money's worth—namely, the fee simple in the estates—did go into the late Duke's pocket. When he got it he could give it to whomsoever he liked. No doubt he always intended to resettle it on his son and grandson and remoter issue; but he was not bound to do so, and, as a fact, he borrowed some money on it before he died, and he took care not to fetter his control over it by not executing a deed which would take effect at once, but by executing instead that which was only a testamentary document. The suggestion on the part of the Crown is that this was always one transaction, the only effect of which was to benefit the defendant by diminishing the estate duty. But I have found that it was not one transaction. I have found that the transaction ended when the entail was barred, i.e., when the deed of disentail had been duly registered. At that moment the defendant had got a bond for 415,000*l.* and Lord Settrington a bond for 287,000*l.* free from any control by the late Duke, and the late Duke had got the fee simple free from any control by the defendant and Lord Settrington, other than the incumbrances. What took place afterwards was, as I have found, done by the several parties of their own motion and without there having been any previous arrangement or understanding. If that be so, how can those subsequent dealings affect the previous transaction? Further, I think it is a mistake to assume that to free one's heir from estate duty is necessarily an act done for his benefit. The freeing of an estate from estate duty at the owner's death is really a benefit to the owner; he has so much more at his disposal. He wishes his family to benefit by his death as much as possible. That is why a man saves. He is not bound to give his heir the benefit of it. If he saves his son from paying 10,000*l.* duty, he is able, if he so desires, to charge his estate with the 10,000*l.* and give the 10,000*l.* to other members of his family. His son will get what he would have got if he had to pay the duty, and no less; and the other members of his family will get 10,000*l.* more. The father will not get the 10,000*l.* into his own pocket, but he will have it to give away at his death. I only point this out in order to shew that it does not necessarily follow that the present defendant will reap the whole benefit if he escapes the payment of

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estate duty. We do not know what changes the late Duke might have made in the disposition of his personal property if he had not thought that the defendant would not have to pay estate duty. On these grounds I have come to the conclusion that the defendant has proved that all these incumbrances were created by the late Duke bona fide for full consideration in money or money's worth wholly for his use and benefit.

It becomes unnecessary, therefore, for me to express any opinion upon the second point, which seems to me to be a point of law of very considerable difficulty, and upon which I have not formed any decided opinion.

My judgment must be for the defendant.

Judgment for defendant.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for defendant: *Burch, Whitehead & Davidsons.*

F. O. R.

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July 11, 12, 15, 16, 30.

THE ATTORNEY-GENERAL *v.* THE DUKE OF RICHMOND, GORDON AND LENNOX (No. 2).

Revenue—Estate Duty—Grant by the Crown of Coal Duty—Tenement—Entailable Hereditament—Conversion of Coal Duty into Annuity—Redemption of Annuity—Purchase of Real Estate—Actual Tenant in Tail—Restraint on barring Entail—30 *Geo.* 2 (*Private*), *c. x., No.* 34—39 *Geo.* 3 (*Private*), *c. lxxxiv.*—39 *&* 40 *Geo.* 3 (*Public*), *c.* 43—39 *&* 40 *Geo.* 3 (*Local and Personal*), *c. ciii.*—1 *Vict.* (*Private*), *c. xxxiv.*—31 *&* 32 *Vict.* (*Private*), *c. iv.*—*Statute De Donis Conditionalibus* (*Westminster II.*, 13 *Edw.* 1, *c.* 1) —34 *&* 35 *Hen.* 8, *c.* 20—*Fines and Recoveries Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 74), *ss.* 15, 18—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 2, 5, *sub-s.* 5.

By letters patent King Charles II. granted to the first Duke of Richmond and the heirs of his body a certain coal duty, then vested in the Crown, of twelve pence per chaldron of sea coals, stone coals or pit coals, to be sold, shipped, carried, or vended, forth or out of the river or haven of Tyne, to hold the same unto and to the use of the said first Duke of Richmond and the heirs of his body, yielding and paying therefor yearly to His Majesty, his heirs and successors, the yearly rent of 1*l.* 6*s.* 8*d.*

By an Act of Parliament of 30 Geo. 2, after reciting that the third

Duke of Richmond had become seised to him and the heirs of the body of the first Duke of Richmond in tail general of the said coal duty, and was desirous that the said coal duty should, in default of issue male of his own body, go to his brother and the heirs male of his body, and was also desirous of making a jointure in favour of his intended wife, but that the limitations in the grant of Charles II. could not be varied without the authority of Parliament, it was enacted that the third Duke of Richmond should be seised of the said coal duty unto and to the use of the third Duke of Richmond and the heirs male of his body, and that in default of heirs male of the body of the third Duke of Richmond the said coal duty should go unto and to the use of the brother of the third Duke of Richmond and the heirs male of his body, with a remainder to the heirs of the body of the first Duke of Richmond; and it was further enacted that it should be lawful for the third Duke of Richmond to limit the yearly sum of 3000*l.* payable out of the said coal duty to the use of his intended wife for her life to be in bar of all dower and thirds which she might thereafter claim out of the said coal duty.

By an Act of Parliament of 39 Geo. 3, after reciting that the ultimate reversion in the said coal duty was vested in the Crown, it was enacted that the Commissioners of the Treasury might on behalf of the Crown contract with the third Duke of Richmond for the purchase of the estate and interest of all persons in the said coal duty for an annuity payable out of the Consolidated Fund. By s. 2 of this Act the annuity was made payable to the third Duke of Richmond and the heirs male of his body, and, in default of heirs male of his body, to the brother of the third Duke of Richmond and the heirs male of his body, and, in default of heirs male of his body, then unto the heirs of the body of the first Duke of Richmond, and, in default of heirs of the body of the first Duke of Richmond, then it was enacted that the said coal duty should revert to the Crown; and it was enacted that the third Duke of Richmond and the heirs male of his body, and the brother of the third Duke of Richmond and the heirs male of his body, and the heirs of the body of the first Duke of Richmond should have the same power of disposition of the said annuity as they had in the said coal duty, and that the said annuity should go to such persons as would have been entitled to the said coal duty if the Act had not been made.

By an indenture dated August 19, 1799, and made in pursuance of this Act, the Commissioners of the Treasury contracted with the third Duke of Richmond for the purchase of all the interests in the said coal duty for an annuity of 19,000*l.* payable out of the Consolidated Fund to the persons entitled thereto according to the limitations declared in s. 2 of the Act. This indenture also contained provisions enabling the annuity to be redeemed by the purchase of 3 per cent. consolidated bank annuities in the names of the Lord High Treasurer or First Commissioner of the Treasury for the time being and certain other trustees therein mentioned, with power to the person for the time being entitled to the annuity or dividends to appoint new trustees other than the Lord High Treasurer or First Commissioner of the Treasury. This indenture

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was subsequently confirmed by an Act of Parliament of 39 & 40 Geo. 3, c. 43.

By an Act of Parliament of 39 & 40 Geo. 3, c. ciii., the third Duke and any future Duke of Richmond were empowered to jointure a wife as therein provided, such jointure to be in bar of all dower; and the trustees were empowered to invest three-fourths of the annuities in the purchase of real estate to be conveyed to the use of such persons as the annuity of 19,000*l.* would have stood limited if the same had not been funded and redeemed; and it was provided that the person in possession of the premises should be liable for waste, and should have certain powers of leasing and exchange and a limited power of cutting timber.

Under the powers of this Act and of Acts of Parliament of 1 Vict. c. xxxiv., and 31 & 32 Vict. c. iv., the late Duke of Richmond became entitled to certain real estate at Goodwood, in the county of Sussex, which had been purchased and conveyed to the same uses to which the annuity of 19,000*l.* would have stood limited if the same had not been funded or redeemed, and subject to the provisions by the Act of 39 & 40 Geo. 3, c. ciii., declared:—

Held, (1.) that after, and probably before, the passing of the Act of 30 Geo. 2, the coal duty was a tenement within the meaning of the Statute De Donis Conditionalibus, and an entailable hereditament;

(2.) that the effect of the Acts of 39 Geo. 3 and 39 & 40 Geo. 3 was to substitute the annuity of 19,000*l.* for the coal duty;

(3.) that the late Duke of Richmond was actual tenant in tail of the Goodwood estates within the meaning of s. 15 of the Fines and Recoveries Act, 1833.

And, it having been admitted that the coal duty was not given as a recompense for any service rendered by the grantee to the Crown within the meaning of the statute 34 & 35 Hen. 8, c. 20:—

Held, (4.) that the Duke of Richmond was not by any other Act restrained from barring his estate tail within the meaning of s. 18 of the Fines and Recoveries Act, 1833; and, consequently,

(5.) that the late Duke of Richmond was competent to dispose of the Goodwood estates at the date of his death within the meaning of s. 2 of the Finance Act, 1894; and, therefore, that on his death estate duty became payable on the principal value of those estates.

INFORMATION by the Attorney-General on behalf of the Crown, claiming that on the death of the late Duke of Richmond, Gordon and Lennox estate duty became payable on the principal value of certain real estate situate at Goodwood, in the county of Sussex, of which it was alleged that the late Duke of Richmond, Gordon and Lennox was tenant in tail.

The following statement of facts is with slight additions taken from the information:—

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1. By a deed poll dated April 8 in the forty-second year of Queen Elizabeth, under the common seals of the governors, stewards and brethren of the fellowship of the hostmen of the town of Newcastle-upon-Tyne, and of the mayor and burgesses of the said town of Newcastle-upon-Tyne, the said corporation of the hostmen of Newcastle, with the consent of the mayor and burgesses, granted unto and to the use of the said Queen Elizabeth, her heirs and successors for ever, for each and every chaldron of sea coals, stone coals or pit coals of the water measure of Newcastle-upon-Tyne aforesaid, as at any time thereafter should be sold, shipped, carried or vended by any person out of the haven or river of Tyne, in the said grant referred to as belonging to the aforesaid town of Newcastle, to be spent within the realm and not transported beyond the seas, the several sums of twelve pence to be paid by the said governors, stewards and brethren and their successors unto the said Queen, her heirs and successors, before any ship or other vessel wherein any such coals should be laden should at any time thereafter be cleared of the custom house of the said Queen in the said town of Newcastle (coals sold from the said port of Newcastle to Hartlepool to be employed as therein mentioned only excepted).

2. By letters patent under the Great Seal dated November 26, in the thirteenth year of Charles II., His said Majesty granted unto Sir Thomas Clarges, his heirs and assigns, a perpetual annuity of 500*l.* payable out of the profits accruing in respect of the aforesaid coal duty.

3. By letters patent under the Great Seal dated December 18, in the twenty-ninth year of Charles II., His said Majesty, for the better support of the honour and dignity of his son Charles Duke of Richmond and Lennox (then an infant of the age of three years), hereinafter called the first Duke, and the heirs of his body, and for want of such issue for the support of the honour and dignity of his cousin Louisa Duchess of Portsmouth, and the heirs of her body, and for divers other good causes and considerations, granted unto the said first Duke all that the said coal duty of twelve pence per chaldron of sea coals, stone coals or pit coals to be sold, shipped, carried or vended forth or out of the said river or haven of Tyne, referred to as belonging to

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the town of Newcastle (except as in the said grant of the forty-second year of Queen Elizabeth mentioned), to hold the same unto and to the use of the said first Duke and the heirs of his body (subject to and charged with the payment of the said annuity of 500*l.* to Sir Thomas Clarges, his heirs and assigns), yielding and paying therefor yearly to His said Majesty, his heirs and successors, the yearly rent of 1*l.* 6*s.* 8*d.*, and from and after the death of the said first Duke without heirs of his body, to and to the use of the said Louisa Duchess of Portsmouth and the heirs of her body, at the same yearly rent of 1*l.* 6*s.* 8*d.*

4. By a private Act of Parliament (30 Geo. 2, c. x., No. 34), after reciting the said letters patent of 29 Car. 2, and reciting that the said first Duke died in the year 1723 leaving issue only a son (hereinafter called the second Duke) and two daughters, and that the said second Duke died in the year 1750 leaving issue two sons, that is to say, Charles, then Duke of Richmond (hereinafter called the third Duke), and Lord George Henry Lennox and five daughters, and that upon the death of the said second Duke the said third Duke became seised to him and the heirs of the body of the said first Duke in tail general of the said duty of twelve pence per chaldron, so that, in case the said third Duke should marry and leave only issue female, the said duty and premises would go and descend to such issue female by virtue of the said grant to his grandfather the said first Duke, and that the said third Duke was desirous that the honour and dignity of the title should be supported according to what seemed to have been the intent of the Crown by the recital in the said letters patent, and that the said coal duty should for the end and purpose aforesaid, in default of issue male of his own body, go to and vest in his brother the said Lord George Henry Lennox and the heirs male of his body in preference to the heirs general of his own body, and that a treaty of marriage had been lately concluded between the said third Duke and the Right Honourable Lady Mary Bruce, and that the said third Duke had proposed, in consideration of the said intended marriage and of the portion of the said Lady Mary Bruce, to grant 3000*l.* a year to be payable out of the said coal duty to her the said Lady Mary Bruce during her life as a jointure in case she should survive him the

said third Duke, and that the said Lady Mary Bruce and her trustees and guardians were willing to accept of such rent-charge in lieu and bar of the dower and thirds of the estate of the said third Duke, to which the said Lady Mary Bruce might otherwise be entitled, but that the limitations in the said grant could not be varied, nor by reason of the minority of the said Lady Mary Bruce could the proposal be carried into execution without the authority of Parliament, it was enacted that from thenceforth the said third Duke should be seised of the said duty or sum of twelve pence (granted by the said letters patent to the first Duke and the heirs male of his body) unto and to the use of the said third Duke and the heirs male of his body (subject to and charged with the payment of the said yearly sum of 500*l.* to the heirs or assigns of the said Sir Thomas Clarges), yielding and paying therefor yearly to His Majesty, his heirs and successors, the said yearly rent of 1*l.* 6*s.* 8*d.*, anything in the said letters patent of December 18 in the twenty-ninth year of King Charles II. to the contrary thereof notwithstanding, and that in default of heirs male of the body of the said third Duke the said duty or sum of twelve pence should go and remain unto and to the use of the said Lord George Henry Lennox and the heirs male of his body (subject as aforesaid), with remainder to the use of the heirs of the body of the said first Duke the grantee in the said letters patent; and it was enacted that all persons who should hold or enjoy the said premises or any part thereof by virtue of any of the limitations in the now stating Act or in the said letters patent contained should hold and enjoy the same in such manner to all intents and purposes as he, she or they would have done if the limitations in the now stating Act contained had been originally inserted in the said letters patent, and subject to the same privileges, advantages, protections and restrictions as if the now stating Act had never been made, and that it should be lawful for the said third Duke to limit as therein mentioned the yearly sum of 3000*l.* payable out of the said duty of twelve pence per chaldron to the use of the said Lady Mary Bruce for her life, immediately after the death of the said third Duke, in case the said intended marriage should take place, and she should happen to survive him, and that the said yearly sum of 3000*l.* so to be

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granted to the said Lady Mary Bruce should be in bar of all dower and thirds, to which the said Lady Mary Bruce might at any time thereafter claim out of the said duty or otherwise.

This Act contained a clause saving always to all and every person and persons, bodies politic and corporate, his, her and their heirs, successors, executors, administrators and assigns (other than the King's most excellent Majesty, his heirs and successors; and other than the said third Duke and the heirs of his body and the heirs of the body of the said Charles the first Duke of Richmond and all other person and persons that thereafter might claim under the said letters patent; and also the said Lady Mary Bruce) all such right, title, claim and demand whatsoever as they, every or any of them might, could or ought to have had, claimed, held or enjoyed in case the Act had never been made.

5. By an Act of Parliament (39 Geo. 3, c. lxxxiv.), after reciting (among other things) that the ultimate reversion in the said duty was vested in His Majesty, his heirs and successors, it was enacted that it should be lawful for the Commissioners of His Majesty's Treasury on behalf of His Majesty to contract with the said third Duke for the absolute purchase of all the estate and interest of him the said third Duke, and the heirs male of his body, and of the said Lord George Henry Lennox, and the heirs male of his body, and of the heirs of the body of the said first Duke, and of all other persons under or by virtue of the said letters patent or Act of Parliament or otherwise, of and in the said duties of twelve pence per chaldron for such annuity to be payable out of the Consolidated Fund as the Commissioners of His Majesty's Treasury should think fit, subject to the provisions therein mentioned, and that such contract should be binding upon the said third Duke and the heirs male of his body, and the said Lord George Henry Lennox and the heirs male of his body, and the heirs of the body of the first Duke, and all other persons claiming under or by virtue of the said letters patent or Act of Parliament or otherwise the said duties or sums, or any right, title or interest therein.

The said Act contained the following provisions:—

Sect. 2: "The annuity so to be agreed upon in lieu of the said duties shall be issuing and payable out of and

charged and chargeable upon the Consolidated Fund (after paying, or reserving sufficient to pay, all such sum or sums of money as have been directed by any former Act or Acts of Parliament to be paid out of the same, but with preference to all other payments which shall or may hereafter be charged upon or payable out of the said fund), free and clear of all deductions and taxes whatsoever, to Charles now Duke of Richmond, and the heirs male of his body; and in default of heirs male of his body, then unto the Right Honourable Lord George Henry Lennox, and the heirs male of his body; and in default of the heirs male of the body of Lord George Henry Lennox, then unto the heirs of the body of the said Charles first Duke of Richmond; and in default of heirs of the body of the said Charles first Duke of Richmond, then the said annuity shall revert to His Majesty, his heirs and successors; and which said annuity or yearly sum shall commence and take effect at such day, and shall be paid and payable at the receipt of the Exchequer out of the Consolidated Fund, in such proportions, and at such times, and in such manner, and by such warrants, as shall be agreed upon in and by such contract, and as the said Commissioners of the Treasury shall direct and appoint."

Sect. 3: "And it is hereby declared to be the true intent and meaning hereof, that the said Charles now Duke of Richmond, and the heirs male of his body, and the said Lord George Henry Lennox, and the heirs male of his body, and the heirs of the body of the said Charles First Duke of Richmond respectively, shall have such and the like, and no larger or other estate, title, power of disposition or alienation and interest of and in the said annuity, as they respectively had of and in the sums or duties hereinbefore mentioned; and the said annuity shall go and be paid from time to time to such person or persons as would have been entitled to the said sums or duties in case this Act had not been made."

Sect. 4: "Provided always, and be it further enacted, that the said annuity so to be granted shall be subject to redemption upon such terms and in such manner as shall be agreed upon between the Commissioners of the Treasury, or the Lord High Treasurer for the time being, and the said Charles Duke of Richmond."

6. By an indenture dated August 19, 1799, and made between

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three of the Commissioners of His Majesty's Treasury of the one part and the said third Duke of the other part, the said Commissioners, in pursuance of the power and authority vested in them by the said Act of 39 Geo. 3, c. lxxxiv., contracted on behalf of His Majesty, his heirs and successors, with the said third Duke for the absolute purchase of all the interests of the persons claiming under the said letters patent or the said Act of 30 Geo. 2, c. x., No. 34, or otherwise in the said duties in consideration of an annuity in lieu thereof of 19,000*l.* to be payable out of the Consolidated Fund to the persons entitled thereto according to the limitations declared in s. 2 of the said Act of 39 Geo. c. lxxxiv.; that is to say "to the said Charles then Duke of Richmond and the heirs male of his body; and in default of heirs male of his body, then unto the said Lord George Henry Lennox and the heirs male of his body; and in default of heirs male of the body of the said Lord George Henry Lennox, then unto the heirs of the body of Charles Duke of Richmond grantee of the said recited letters patent; and in default of heirs of the body of the same Charles Duke of Richmond then the said annuity shall revert to His Majesty his heirs and successors." And the now stating indenture contained provisions enabling the said annuity to be redeemed by the purchase of 3 per cent. consolidated bank annuities in the names of the Lord High Treasurer or the First Commissioner of the Treasury for the time being and certain other trustees therein mentioned; and it was thereby declared that the said bank annuities should be vested in the said trustees in trust for the said third Duke and such other person or persons as would for the time being have been entitled to the said annuity of 19,000*l.* in case the same had not been funded or redeemed; and it was thereby declared that it should be lawful for the said third Duke or the person or persons for the time being entitled to the said annuities or the dividends of the said bank annuities with the consent therein mentioned to appoint a new trustee or trustees other than the Lord High Treasurer or First Commissioner of the Treasury, so that the said trust funds should always be vested in the names of the Lord High Treasurer or First Commissioner of the Treasury and four other trustees.

By an Act of Parliament (39 & 40 Geo. 3, c. 43), after reciting (among other things) the said indenture of contract of August 19, 1799, it was enacted that the same should be and was thereby confirmed; and it was further enacted to the effect of the provisions in the said indenture. In particular by s. 2 of this Act it was provided as follows: "In default of the heirs of the body of the said Charles first Duke of Richmond the said annuity shall belong and revert or be considered as reverting to His Majesty, his heirs and successors."

By s. 7 of this Act it was provided that in case the then Duke of Richmond or the person entitled to the annuity should be desirous that the annuity or any part thereof should be funded or redeemed and should give six months' notice in writing to the Commissioners of the Treasury or Lord High Treasurer for the time being, then the Commissioners, or any three of them, or the Lord High Treasurer, should direct that there should be purchased and invested in the names of the Lord High Treasurer or First Commissioner of the Treasury and other trustees appointed, as directed by the Act, so much of the 3 per cent. consolidated bank annuities as should produce a clear yearly annuity equal to the annuity of 19,000*l.*, or to so much thereof as the then Duke of Richmond or person for the time being entitled as aforesaid should require to be redeemed; and that the 3 per cent. consolidated bank annuities so to be purchased and invested should be vested in, and the dividends received thereon should be payable to the trustees in trust for, the then Duke of Richmond and such other persons as, and exclusive of His Majesty, his heirs and successors, would have been entitled to the annuity of 19,000*l.* in case the same had not been funded and redeemed, and in default of heirs of the body of the first Duke of Richmond, in trust for His Majesty, his heirs and successors.

7. By an Act of Parliament of 39 & 40 Geo. 3, c. ciii., after reciting to the effect of most of the statements hereinbefore set forth, and particularly reciting at length the limitations of the annuity of 19,000*l.* set out in the indenture of August 19, 1799, and in the confirming Act of 39 & 40 Geo. 3, c. 43, and reciting that in order to prevent any question arising respecting

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the right of dower of any wife of the person for the time being entitled to the said annuity of 19,000*l.*, or the bank annuities purchased in lieu thereof, it was desired that power should be vested in the person for the time being entitled as aforesaid to charge the said annuity and dividends with an annual sum by way of jointure, and in bar of dower; the said third Duke and the said Lord George Henry Lennox and Charles Lennox his son (hereinafter called the fourth Duke), and any future Duke, when they should respectively become entitled in possession to the said annuity or dividends as aforesaid, were empowered to jointure a wife to the extent of 2000*l.* per annum, and the said Act conferred on any such wife a jointure to the full extent, even though the said power should not have been exercised, such jointures to be in bar of all dower, and to be payable out of the said annuity of 19,000*l.*, or the bank annuities purchased in lieu thereof, and it was further provided that the said jointures should not exceed 4000*l.* in all. And the now stating Act, after reciting that its objects could not be effected without the aid and authority of Parliament, conferred by s. 10 thereof a power upon the said trustees, with the consent of the person for the time being entitled to the premises in possession, to sell the said 3 per cent. consolidated bank annuities or other securities purchased in lieu thereof under the power in the now stating Act contained; and by s. 11, subject to leaving a sum sufficient to produce a yearly income equal to one-fourth of the said annuity of 19,000*l.* invested as therein mentioned, to invest the proceeds in the purchase of real estate, which when purchased was to be conveyed to the use of such persons and for such estates as the said annuity of 19,000*l.* would, by virtue of the limitations in the now stating Act contained, have stood limited in case the same had not been funded and redeemed. And the now stating Act further provided that the person entitled in possession to the premises should be answerable for waste, and constituted part of the proceeds of the sales of timber a fund by way of portions for younger children, and conferred certain powers of leasing and exchange on the person entitled for the time being in possession to the real estates and on the said trustees respectively as

therein mentioned. By s. 15 of this Act it was provided that it should not be lawful to cut down any timber growing upon the lands and hereditaments so to be purchased and settled otherwise than in the manner thereinafter authorized, and that the person cutting down timber otherwise than as authorized should be responsible to the trustees (exclusive of the Lord High Treasurer or First Commissioner of the Treasury) for the value of the timber so cut down, and suable in an action on the case for damages and treble costs. By s. 16 it was enacted that in the month of November in every year a survey and valuation should be made by some person appointed by the trustees other than the Lord High Treasurer or First Commissioner of the Treasury of all timber growing on the lands and hereditaments which the Duke of Richmond or the person for the time being in possession might wish to have cut down in the course of the ensuing year, and should be fit and in proper course and otherwise proper to be cut down; the survey was to be reduced into writing signed by the person appointed to make it and verified by his oath; and that after the valuation was so made and sworn the trustees, with the consent in writing of the Duke of Richmond or other person as aforesaid, might direct that so much of the timber as should have been selected and marked for cutting by the person making the survey and valuation should be cut and sold for such sum as to the trustees other than the Lord High Treasurer or First Commissioner of the Treasury should appear to be the best price reasonably obtainable.

This Act also empowered the person for the time being entitled to the premises in possession to appoint new trustees other than the said First Commissioner, such power to be in lieu of the provision for appointing new trustees in the said indenture of August 19, 1799, contained, and provided that it should be lawful for any three of the said trustees, of whom the said First Commissioner for the time being should be one, to do and execute all such things in execution of the trust as all the said trustees respectively were thereby authorized and empowered to do. And it was further enacted that the now stating Act should be deemed to be a public Act.

8. By a private Act of Parliament (1 Vict. c. xxxiv.), after

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confirming certain sales of the said bank annuities which had been made in excess of the provisions in the said Act of 39 & 40 Geo. 3, c. ciii. in that behalf contained, and enacting that the real estate purchased with the proceeds thereof should be deemed to have been limited to the uses in the said last-mentioned Act directed to be limited concerning the real estate by the same Act authorized to be purchased, in the same manner as if the said power of purchasing real estate had not been limited by the provision in the said Act contained, and making certain other provisions relating to the said jointures, the said trustees were authorized, with the consent of the person for the time being entitled in possession to the income of the said bank annuities or securities purchased in lieu thereof, to sell the same and invest the proceeds in the purchase of real estates which were, by s. 13, to be conveyed to the same uses to which the said annuity of 19,000*l.* would by virtue of the said Act of 39 & 40 Geo. 3, c. 43, have stood limited, if the same had not been funded or redeemed; and to be subject to the same powers, restrictions, provisions and directions as by the said Act of 39 & 40 Geo. 3, c. ciii. are declared concerning the real estate thereby authorized to be purchased, other than the trusts in the same Act declared concerning the proceeds of sale of timber. And the now stating Act contained provisions varying the said trusts of the proceeds of sale of timber, and the powers of leasing and exchanging the said real estates, contained in the said Act of 39 & 40 Geo. 3, c. ciii.

9. By a private Act intituled "The Duke of Richmond's Estate Act, 1868" (31 & 32 Vict. c. iv.), the said trustees were authorized upon giving notice to the Crown to sell certain lands therein specified, and to invest the proceeds in the purchase of other lands which were, by s. 6, to be settled to such of the uses, in the said Acts of 39 & 40 Geo. 3, c. ciii. and 1 Vict. c. xxxiv. contained, as might be subsisting and capable of taking effect, and were further authorized to raise by way of mortgage a sum of 30,000*l.*, to be held, by s. 17, on the same trusts, and subject to the same powers, as if the same had been moneys arising from such sales as were thereinbefore authorized.

10. The said third Duke died in 1806, and was succeeded under

the limitations of the said entail by his nephew the said Charles Lennox, the fourth Duke. The said fourth Duke was succeeded by his son and grandson, the fifth and sixth Dukes. Charles Henry, sixth Duke of Richmond, died on September 27, 1903, and was succeeded by his eldest son the defendant Charles Henry, now seventh Duke of Richmond, Gordon and Lennox, alleged in the information to be then tenant in tail male of and in possession or receipt of the rents and profits of the said entailed properties under the limitations aforesaid.

11. The defendants the First Lord Commissioner of His Majesty's Treasury for the time being, Colonel Sir Robert Nigel Fitz-Hardinge Kingscote, K.C.B., and Horace Peel had been appointed and are now the trustees, for the purposes of the said Acts 39 & 40 Geo. 3, c. ciii. and 1 Vict. c. xxxiv. and the Duke of Richmond's Estate Act, 1868.

12. The property to which the said sixth Duke was in the information alleged to have been entitled as tenant in tail male in possession under the limitations aforesaid consists of the following securities standing in the names of the defendants the said trustees, viz., 507*l.* 5*s.* 5*d.* 2½ per cent. Consols, 7000*l.* Highland Railway 4 per cent. debenture stock, 1539*l.* North Eastern Railway 3 per cent. debenture stock, 2955*l.* Taff Vale Railway 3 per cent. debenture stock, and of lands and hereditaments situate in Sussex known as the Goodwood estates, which have from time to time been purchased under the powers contained in the said Acts and conveyed to the uses of the said Acts or some of them. The bulk of the said estates were purchased in 1810, and conveyed by indenture of December 27, 1810, to the use of such persons, and for such estates, as the said annuity of 19,000*l.* would by virtue of the limitations in the said Act 39 & 40 Geo. 3, c. ciii. have stood limited in case no part thereof had been funded or redeemed. Lands purchased since 1868 have been conveyed to the uses upon the trusts and with and subject to the powers and provisions which under the Duke of Richmond's Estate Act, 1868, and the Acts therein recited, or by reason of any exercise of the power of jointures, are now subsisting with respect to the estates subject to the settlement made by virtue of the said Acts.

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13. It was alleged by the Crown, and admitted by the defendants, that the grant of the coal duty made by Charles II. to the said first Duke, as hereinbefore mentioned, was not made as a recompense for any service rendered by the grantee to the Crown within the meaning of the statute 34 & 35 Hen. 8, c. 20.

14. Under these circumstances it was claimed that estate duty under the provisions of the Finance Act, 1894, became payable on the death of the said sixth Duke of Richmond, Gordon and Lennox upon the principal value of the property to which the said sixth Duke was alleged to be entitled as tenant in tail male in possession under the limitations aforesaid. The Commissioners of Inland Revenue caused application to be made to the defendants for payment of the said duty, but the defendants respectively refused to pay the same unless and until the right of the Crown to such duty should have been established by the decree of this honourable Court.

The informant on behalf of His Majesty prayed :—

1. That it might be declared that upon the death of the said sixth Duke of Richmond, Gordon and Lennox estate duty became payable under the provisions of the Finance Act, 1894, upon the principal value ascertained as in the said Act provided of the estates and property to which the said sixth Duke was entitled as tenant in tail male in possession under the limitations in the said Acts or some of them declared and hereinbefore mentioned, including the securities standing in the names of the defendants the parliamentary trustees of the said estates, and that the said duty was a first charge on the said estates and property.

2. That an account should, if necessary, be directed to ascertain the amount of the estate duty and interest thereon payable in respect of the said estates and property, and that the defendant the present Duke, and also (to the extent of the securities and property vested in them) the said other defendants, might be ordered to pay the amount of the said duty and interest to the Commissioners of Inland Revenue, the informant thereby waiving such penalties as the defendants or any of them might have incurred by reason of the said duty not having been paid up to the present time.

3. That a receiver should be appointed of the said estates and property and the rents and profits thereof, and that, if necessary, a sale of a sufficient portion thereof to satisfy the said duty and interest might be ordered.

4. That all necessary and proper inquiries might be made, directions given and accounts taken for the purposes aforesaid.

5. That the informant on behalf of His Majesty might have such further or other relief in the premises as the case might require.

Sir J. Lawson Walton, A.-G., and *Vaughan Hawkins*, for the Crown. The broad scheme and intention of these statutes from the Act of 39 Geo. 3, c. lxxxiv., down to the Duke of Richmond's Estate Act, 1868, has been to convert the coal duty settled by 30 Geo. 2, c. x., No. 34, into an annuity, and the annuity into land, but to confer upon the holder for the time being of the annuity and the owner for the time being of the land no greater or less interest in the annuity or land than the third Duke of Richmond had in the coal duty under the provisions of 30 Geo. 2, c. x., No. 34. The question in this case, therefore, is, What was the interest or estate which the third Duke of Richmond had in the coal duty?

The history of this coal duty, which was the subject of the letters patent of 29 Car. 2, is set out in Hargrave's Law Tracts, Concerning the Customs, ch. 25, pp. 230 et seq. It appears that in the reign of Henry V. (1) the Crown was entitled to a duty of two pence per chaldron on all coals sold in Newcastle to those that were not free of the town of Newcastle. In the reign of Henry VI. the mayor and burgesses of Newcastle obtained a charter, under which, apparently on insufficient grounds, they claimed this two pence per chaldron as a toll and actually enjoyed it, levying it from the buyer and employing it by their hostmen (2) towards

(1) See the statute 9 Hen. 5, statute 1, c. 10.

(2) "In the municipal life of the Middle Ages, hosts, hostelers, or hostmen were those free inhabitant householders to whom was assigned the duty of entertaining merchant strangers, of becoming answerable for their peaceful conduct, and of supervising the sales and purchases of their wares and merchandise. It was one of the privileges of their position that they should furnish their guests with such supplies as

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the repair of their bridge and port, until the fortieth year of Elizabeth, when their title to this toll was called in question. With a view to quieting any doubts that might arise in the future and for their better security, the mayor and commonalty in the forty-second year of Elizabeth renewed their charter, and got these duties confirmed to them and arrears due to the Crown, if any, discharged; "and in compensation thereof granted to the Crown twelve pence per chaldron for every chaldron of coals exported and sold." (1) This duty or sum of money was expressly preserved to the Crown by the Statute of Monopolies (21 Jac. 1, c. 3), s. 12, and also by the Subsidy Act (12 Car. 2, c. 4): see r. xxvii. appended to the Act.

It is further stated in Hargrave's Law Tracts, ch. 6, De Portibus Maris, that in all public seaports in England there are three kinds of rights—viz., the jus privatum, jus publicum, and jus regium. The jus privatum is the interest of propriety or franchise which may be in the town or ville that is the caput portus, and the inhabitants thereof. From this jus dominii of property or franchise, or both, there arise several port duties, sometimes called portatica, sometimes tolls, sometimes customs; and these are of two kinds, viz., such as are common and ordinary, and so almost incident to every ownership of a port, or such as are by special usage or prescription. Of these latter "Some were in respect of goods imported into the port . . . . such were those prises or customs belonging to the King in his port of Newcastle, who was used in the time of Edward I. to have of every great vessel with oars four pence, of every lesser a penny." These duties therefore savour of the realty, and are tenements within the Statute De Donis: Co. Lit. 20a; and could therefore be entailed. That being so, the coal duty was in fact entailed by the letters patent of December 18 in the twenty-

were not monopolized by any trading guild already established in the place in which they resided. . . . .

"Coal and grindstones were special products of the district served by the port of Newcastle, and were not appropriated to any of the older trading guilds in that town. In and about the early part of the sixteenth century . . . . the hostmen of Newcastle obtained a practical monopoly of supplying their guests with those goods." (Publications of the Surtees Society, vol. cx., Introd.).

(1) See post, p. 981 (note)

ninth year of Charles II., and an estate in tail general was thereby granted to the first Duke.

Then came the private Act of 30 Geo. 2, c. x., No. 34. That Act recites, among other things, the death of the first Duke, leaving issue one son, the second Duke, and two daughters; also the death of the second Duke, leaving two sons, namely, the third Duke and Lord George Henry Lennox, and five daughters; the Act also recites, perfectly accurately, that "upon the death of the said Charles late Duke of Richmond, Lenox, and Aubigny" —i.e., the second Duke—"the said Charles now Duke of Richmond, Lenox, and Aubigny"—i.e., the third Duke—"became seised to him and the heirs of the body of the first Charles Duke of Richmond and Lenox, in tail general of the said duty of twelve pence per chaldron"; in other words, that the third Duke became tenant in tail by descent; and then it is enacted that the third Duke "shall have, hold, and enjoy and be seised of the said duty or sum of twelve pence, due and payable for each and every such and so many chaldron of sea coals, stone coals, or pit coals, aforesaid, as shall be sold, shipped, carried, or vended, from or out of the port or river of Tyne; as aforesaid, so granted by the said first recited letters patent to the said Charles first Duke of Richmond, and the heirs of his body, unto him the said Charles now Duke of Richmond, Lenox and Aubigny, and the heirs male of his body lawfully to be begotten; subject nevertheless" as therein provided. Then it is enacted that in default of heirs male of the body of the third Duke the said duty shall vest in Lord George Henry Lennox and the heirs male of his body; and in default of heirs male of the body of Lord George Henry Lennox, the said duty is to vest in the heirs of the body of the first Duke; and "that all and every person or persons who shall take, hold, or enjoy the said premises, or any part thereof under or by virtue of any of the limitations herein, or in the letters patent contained, shall take, hold, and enjoy the same in such manner and quality to all intents and purposes whatsoever as she or they would have done if the said limitations in this Act contained had been originally inserted in the said letters patent; and subject to the same privileges, advantages, protections, and restrictions as if this Act of Parliament had never

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been made." This last enactment relates to the means of recovering and taking the duty, and not to the line of descent. Then the third Duke is enabled to grant an annuity to Lady Mary Bruce, and it is enacted that the annuity so granted "is and shall be taken to be in full for her jointure, and in recompense, satisfaction, and bar of all dower, title of dower, and thirds, which she the said Lady Mary Bruce may at any time hereafter claim, demand, or be intitled to, of, in, to, or out of the said duty of twelve pence per chaldron or of, in, to, or out of any manors, lands, tenements, or hereditaments, whereof the said Charles Duke of Richmond, Lenox and Aubigny"—i.e., the third Duke —"now is or at any time hereafter may be seised."

This shews that in the view of the Legislature this coal duty was a real and entailable hereditament, for dower could only be claimed out of an estate of inheritance which the husband had in land and tenements: Co. Lit. 30b; and not out of a mere personal annuity, which, though it may be made descendible to heirs, is not liable to dower: Co. Lit. 32a; *Lyster* v. *Mahony*. (1) Whatever nature and incidents that Act conferred upon or confirmed in the coal duty must be taken as conclusive upon all parties to this information, because they all derive title through it. Subsequent Acts have altered the subject-matter of the property, but not the estate in it. If the third Duke had an estate in tail male in the coal duty, the present Duke has an estate in tail male in the Goodwood estates.

The Act of 39 Geo. 3, c. lxxxiv., after reciting the letters patent of December 18 in the twenty-ninth year of Charles II., and the Act of 30 Geo. 2, c. x., No. 34, proceeds to recite with perfect accuracy that "the ultimate reversion in the said duties is vested in His Majesty, his heirs and successors." This is not only consistent with, but is strong evidence of, an estate tail having been granted by the Crown in the coal duty. The Act then enabled "the Commissioners of His Majesty's Treasury, or any three or more of them, or the Lord High Treasurer for the time being, on behalf of His Majesty, his heirs and successors, to treat, contract, and agree with the said Charles now Duke of Richmond"—i.e., the third Duke—"for the absolute purchase

(1) (1841) 1 Dr. & W. 236, at p. 242.

or surrender of all the estate, right, title, and interest of him the said Charles now Duke of Richmond, and the heirs male of his body, and of the said Lord George Henry Lenox and the heirs male of his body, and of the heirs of the body of the said Charles first Duke of Richmond, and of all other persons, under or by virtue of the said letters patent or Act of Parliament, or otherwise, of and in the said duties of twelve pence per chaldron, and for all the rights, privileges, profits, and other advantages whatsoever belonging thereto, for such annuity, to be charged upon and to be payable out of the Consolidated Fund as the Commissioners of His Majesty's Treasury now or for the time being, or any three or more of them, or the Lord High Treasurer for the time being, shall think fit, provided," &c., as therein mentioned. By s. 2 the annuity so agreed upon is to be payable to Charles third Duke of Richmond and the heirs male of his body; and in default of heirs male of his body, then to Lord George Henry Lennox and the heirs male of his body; and in default of heirs male of the body of Lord George Henry Lennox, then to the heirs of the body of Charles first Duke of Richmond; "and in default of heirs of the body of the said Charles first Duke of Richmond, then the said annuity shall revert to His Majesty, his heirs and successors." That enactment gave the third Duke precisely the same estate in the annuity as he had in the coal duty for which the annuity was substituted, that is to say, an estate in tail male. But, in order to place the matter beyond possibility of doubt, it is expressly enacted by s. 3 that the third Duke and the heirs male of his body, and Lord George Henry Lennox and the heirs male of his body, and the heirs of the body of the first Duke, "shall have such and the like and no larger or other estate, title, power of disposition or alienation and interest of and in the said annuity as they respectively had of and in the sums or duties hereinbefore mentioned; and the said annuity shall go and be paid from time to time to such person or persons as would have been entitled to the said sums or duties in case this Act had not been made."

Then by the indenture of August 19, 1799, made in pursuance of the last-mentioned Act, the Commissioners of the Treasury

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purchased the coal duty for an annuity of 19,000*l.* payable to the persons indicated in s. 2 of that Act; and by the Act of 39 & 40 Geo. 3, c. 43, that indenture and its provisions were confirmed.

The Act of 39 & 40 Geo. 3, c. ciii. sets out at length the limitations in the last-mentioned Act and in the Act of 39 Geo. 3, c. lxxxiv. contained with reference to the annuity of 19,000*l.*, and then enables the trustees to sell portion of the bank annuities representing it and invest the proceeds in the purchase of land to be conveyed to the use of such persons and for such estates as the annuity of 19,000*l.* would by virtue of the limitations in the Act contained have stood limited in case the same had not been funded and redeemed.

By the Act of 1 Vict. c. xxxiv. further powers were conferred upon the person for the time being entitled to the income of the annuity to sell the annuity and invest the proceeds in the purchase of real estates, to be conveyed to the same uses to which the annuity of 19,000*l.* would by virtue of the Act of 39 & 40 Geo. 3, c. 43, have stood limited if the same had not been funded or redeemed.

By the Duke of Richmond's Estate Act, 1868, the trustees were empowered to sell certain lands therein specified and to invest the proceeds in the purchase of other lands to be settled to such of the uses in the Acts of 39 & 40 Geo. 3, c. ciii. and 1 Vict. c. xxxiv. as were capable of taking effect.

The lands and other property the subject of the present information have been acquired under the powers of the Acts of 39 & 40 Geo. 3, c. ciii. and the Duke of Richmond's Estate Act, 1868. The result is that the late Duke of Richmond was tenant in tail of the Goodwood estates, and that on the death of the late Duke estate duty became payable under s. 1 of the Finance Act, 1894. (1)

(1) By s. 1 of the Finance Act, 1894, a duty called estate duty is made payable upon the principal value ascertained as in the Act provided of all property passing on the death of any person dying after the commencement of Part I. of the Act (August 1, 1894). The Act contains the following, among other, provisions:—

Sect. 2: "(1.) Property passing on the death of the deceased shall be

Danckwerts, K.C., and *Austen-Cartmell*, for the defendant the Duke of Richmond. The position of the Duke of Richmond is not adverse to the claim of the Crown to estate duty. He simply desires to submit for the consideration of the Court the view which his advisers take as to his interest in the Goodwood estates.

The subject-matter of the grant by the corporation of hostmen of Newcastle to Queen Elizabeth was a mere personal annuity payable out of the coffers and secured by the covenant of the corporation. It did not in any way savour of the realty, and although it is described as the sum of twelve pence for every chaldron of sea coals, stone coals or pit coals, that description merely relates to the quantity or amount, and not to the nature of the annuity.

There is no doubt that an annuity, though it be merely a personal annuity, may be limited to a grantee and his heirs or a grantee and the heirs or heirs male of his body. In this respect a personal annuity is an exception from the general law that there cannot be an estate in personalty: Bac. Abr. Annuity, vol. 1, p. 233; Fitzherbert, Natura Brevium, p. 152. If not aliened it descends to the heir or heir of the body of the grantee: *Turner* v. *Turner*. (1) If the annuity be limited to the grantee and the heirs, or heirs male, of his body, in all such cases the grantee "hath a fee conditional as they were before

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deemed to include the property following, that is to say:—

(*a*) Property of which the deceased was at the time of his death competent to dispose . . . ."

Sect. 22: "(2.) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were sui juris, enable him to dispose of the property, including a tenant in tail whether in possession or not . . . ."

Sect. 5: "(5.) Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty."

(1) (1783) Amb. 776; 1 Bro. C. C. 316.

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the statute"—i.e. the Statute De Donis—"and the grantee by his grant or release may barre his heir, as he might have done at the common law, for that in these cases he is not restrained by the said statute": Co. Lit. 20a; Bac. Abr. Annuity, C., vol. 1, p. 241; Cruise, Dig. vol. 1, p. 73, tit. 2, ch. 1, ss. 27 et seq.; Doctor and Student, Dialogue I., ch. 30, p. 89; Sheppard, Touchstone, p. 11.

As soon as issue is born the annuity becomes assignable: *Earl of Stafford* v. *Buckley*. (1)

If a rent be granted in tail, the grantee cannot alien it while it continues a rent, because as such it may be entailed within the Statute De Donis; but if the grantee brings his writ of annuity, it is no longer within the statute, because then it is become a charge merely personal, without any relation to the land out of which it was first granted, and therefore is become a fee simple conditional as such a gift of lands had been before the statute; and therefore the annuity, not being within the statute, may be aliened: Bac. Abr. Annuity, C., vol. 1, p. 241; Cruise, Dig. vol. 1, tit. 2, ch. 1, ss. 27 et seq; and that is so whether the annuity is granted by the Crown or not: *Holdernesse* v. *Carmarthen*. (2)

The result is that the first Duke of Richmond, on having an heir male, had an alienable estate in the coal duty granted to him by Charles II. He might have granted it to a feoffee to the use of himself and the heirs male of his body, with remainder to Lord George Henry Lennox and the heirs male of his body, with remainder to the heirs of the body of the first Duke, and he might have granted a jointure of 3000*l.* or any other sum out of his interest in the duty. It is true that the Act of 30 Geo. 2, c. x., No. 34, recites that this could not be done without the authority of Parliament, but "a mere recital in an Act of Parliament, either of fact or law, is not conclusive"; and the Court is "at liberty to consider the fact or the law to be different from the statement in the recital": *Reg.* v. *Haughton* (*Inhabitants*)(3); *Mollwo* v. *Court of Wards* (4); *Mertens* v. *Hill* (5); Cruise, Dig. vol. 5, p. 17, tit. 33, s. 42. A private Act of Parliament is

(1) (1750) 2 Ves. Sen. 171.
(2) (1784) 1 Bro. C. C. 377.
(3) (1853) 1 E. & B. 501, at p. 516.
(4) (1872) L. R. 4 P. C. 419, at p. 437.
(5) [1901] 1 Ch. 842, at p. 852

merely a parliamentary conveyance: 2 Bl. Com. 344-6; Com. Dig. Parliament (R 7); *Hornby* v. *Houlditch* (1); Cruise, Dig. vol. 5, p. 12, tit. 33, s. 39; *Rowbotham* v. *Wilson* (2), per Lord Wensleydale; *London and South Western Ry. Co.* v. *Flower* (3); *Countess of Rothes* v. *Kirkaldy Waterworks Commissioners* (4); *Savin* v. *Hoylake Ry. Co.* (5); *Earl of Shrewsbury* v. *Scott.* (6) Such an Act conferring an estate confers it with all its incidents, and if the estate be to the grantee and the heirs male of his body he takes an estate tail, with the right to dispose of it: *Murrey* v. *Eyton* (7); *Neal* d. *Duke of Athol* v. *Wilding* (8); *Nevil's Case* (9); *Attorney-General* v. *Duke of Marlborough.* (10)

When in the limitation of an estate a reversion in fee on the termination of an estate tail was vested in the Crown, it was formerly a vexed question how far the tenant in tail could, by suffering a recovery, bar the Crown of its reversion: Pigott on Recoveries, pp. 85 et seq.; Cruise, Dig. vol. 5, p. 422, tit. 36, ch. 10, s. 54. But since the Fines and Recoveries Act, 1833, all such questions are laid to rest, for s. 15 of that Act enacts in express terms that the reversion in the Crown is barred by a disentailing assurance executed in accordance with the Act: *Duke of Grafton* v. *London and Birmingham Ry. Co.* (11) By s. 18 of that Act it is provided that the power of disposition conferred by the Act is not to extend to tenants of estates tail who, by an Act passed in the 34 & 35 Hen. 8, c. 20, intituled an Act to embar feigned recovery of lands wherein the King is in reversion or by any other Act, are restrained from barring their estates tail. But that Act only applies, as appears from its preamble, to estates tail granted by the Crown as a recompense for the service of the donees, and does not apply to estates tail granted out of mere love and affection: *Duke of Grafton* v. *London and Birmingham Ry. Co.* (11); *Robinson* v. *Giffard.* (12)

(1) (1737) 1 T. R. 93, n. (*a*).
(2) (1860) 8 H. L. C. 348, at p. 363.
(3) (1875) 1 C. P. D. 77, at p. 85.
(4) (1882) 7 App. Cas. 694.
(5) (1865) L. R. 1 Ex. 9.
(6) (1859) 6 C. B. (N.S.) 1, at p. 157.
(7) (1679) Sir T. Raym. 338.
(8) (1750) 1 Wils. 275.
(9) (1604) 7 Rep. 33a.
(10) (1818) 3 Madd. 498, at pp. 535, 548.
(11) (1838) 5 Bing. N. C. 27.
(12) [1903] 1 Ch. 865.

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The only question remaining is whether the defendant the Duke of Richmond is, in the words of s. 18 of the Fines and Recoveries Act, 1833, "restrained from barring" his estate tail "by any other Act." These words must mean restrained expressly or by necessary implication. Examples of restrictions by other Acts will be found in the Shrewsbury Estates Act (6 Geo. 1, c. xxix.), s. 8: see *Earl of Shrewsbury* v. *Scott* (1) and *Howard* v. *Earl of Shrewsbury* (2); the Act for the Restitution of the heirs of Sir Edward Neville (2 & 3 Ph. & M. c. xxiii.): see *Earl of Abergavenny* v. *Brace* (3); the Wellington Act (54 Geo. 3, c. clxi.): see *Earl of Abergavenny* v. *Brace* (4); the Broke Estates Act, 1535 (27 Hen. 8, c. xvi.): see *In re Bolton Estates*, *Russell* v. *Meyrick*. (5)

In none of the Acts relating to the Duke of Richmond's estates is there any express restriction. Nor is there any implied restriction. Restrictions against committing waste or cutting timber are not restrictions against alienating, and have never been so considered. They only apply while the settlement is in existence. In the days of common recoveries they would not prevent the tenant in tail from suffering a recovery; the land the subject of the recovery would go free of all restrictions, and the restrictions would apply to the tenements recovered by the tenant in tail from his vouchee to warranty. The result is that the late Duke of Richmond is competent to dispose of the Goodwood Estates and that the estate duty is payable.

Sir W. S. Robson, *S.-G.*, and *Rowlatt*, for the trustees. The trustees represent the interests of the successors to the defendant the Duke of Richmond. These statutes create an inalienable estate, and not an estate tail, in the Duke of Richmond, and limit an ultimate reversion to the Crown; that is to say, each Duke of Richmond when and so long as he is in possession of the estate may part with his interest in possession, but he cannot bar his successors, and he cannot bar the ultimate reversion in the Crown. This is clear from the Act 30 Geo. 2, c. x., No. 34, which, after reciting that the third Duke of Richmond became seised to him

(1) 6 C. B. (N.S.) at p. 78.
(2) (1867) L. R. 3 Eq. 218.
(3) (1872) L. R. 7 Ex. 145.
(4) L. R. 7 Ex. at p. 161.
(5) [1903] 2 Ch. 461.

and the heirs of the body of the first Duke in tail general of the duty of twelve pence, and that he was desirous that the said coal duty should go and vest in his brother Lord George Henry Lennox and the heirs male of his body in preference to the heirs general of his own body, proceeds to recite that that proposal cannot be carried out without the authority of Parliament.

Again, by the Act of 39 Geo. 3, c. lxxxiv., which recites that the ultimate reversion in the coal duty was vested in His Majesty, his heirs and successors, the coal duty was converted into an annuity payable out of the Consolidated Fund to the third Duke and the heirs male of his body; in default of such heirs, to Lord George Henry Lennox and the heirs male of his body; and in default of such heirs, to the heirs of the body of the first Duke, and in default of heirs of the body of the first Duke the said annuity was to revert to His Majesty, his heirs and successors. Then it is expressly enacted and declared in s. 3 to be the true meaning and intent of the Act that the third Duke and the heirs male of his body, and Lord George Henry Lennox and the heirs male of his body, and the heirs of the body of the first Duke, shall have the like, and no larger or other, power of disposition or alienation as they had of the duties; that is to say, no power or disposition without the authority of Parliament.

In pursuance of the last-mentioned Act an indenture was executed on August 19, 1799, between the Commissioners of the Treasury of the one part and the third Duke of the other part, whereby the Commissioners agreed to purchase all the interests in the coal duty for an annuity of 19,000*l.*, to be payable out of the Consolidated Fund, "to the said Charles then Duke of Richmond and the heirs male of his body; and in default of heirs male of his body, then unto the said Lord George Henry Lennox and the heirs male of his body; and in default of heirs male of the body of the said Lord George Henry Lennox, then unto the heirs of the body of the said Charles Duke of Richmond, grantee of the said recited letters patent; and in default of heirs of the body of the same Charles Duke of Richmond, then the said annuity shall revert to His Majesty, his heirs and successors." By the Act of 39 & 40 Geo. 3, c. 43, the provisions of that indenture were confirmed, and it was

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expressly provided that in default of heirs of the body of Charles first Duke of Richmond the annuity should belong and revert and be considered as belonging and reverting to His Majesty, his heirs and successors.

Then the Act of 39 & 40 Geo. 3, c. ciii., which empowered the Duke of Richmond for the time being entitled to the annuity to limit a jointure out of the annuity, and to sell part thereof and invest the proceeds in real property, contains a recital that the same cannot be effected without the aid and authority of Parliament. It also recites in full the limitations of the annuity set out in the indenture of August 19, 1799, and in the confirming Act of 39 & 40 Geo. 3, c. 43, and then enacts by s. 11 that the real estate purchased under the powers conferred by the Act is to be settled, conveyed, and assured to the use of such persons and for such estates as the said annuity of 19,000*l.* would by virtue of the limitations in the Act contained have stood limited in case the same had not been funded or redeemed. By s. 14 it is made unlawful for the person in receipt of the rents and profits of the real estate so purchased to commit or permit any kind of waste. By s. 15 no timber is to be cut, except upon a valuation of timber fit to be cut down made by a surveyor appointed by the trustees (s. 16), the proceeds of which timber is to be applied as directed by ss. 17 and following. By s. 25 express statutory power is given to exchange the lands acquired for others; and s. 13 contains an express power of leasing. The fact that these powers are given in express terms, and with statutory restrictions on the exercise of them which the trustees are the persons to enforce, is inconsistent with any tenancy in tail in the Duke of Richmond for the time being.

By the Act of 1 Vict. c. xxxiv., s. 12, further power was given to invest in real property; by s. 13 the lands purchased were to be forthwith settled, conveyed, and assured to and for the uses and estates to and for which the said annuity of 19,000*l.* would by virtue of the Act of 39 & 40 Geo. 3, c. 43, have stood limited if the same had not been funded or redeemed; and the same lands when so purchased and settled as aforesaid were to be subject to such and the same powers, restrictions, provisions, and directions

as by the Act of 39 & 40 Geo. 3, c. ciii., declared concerning the lands thereby authorized to be purchased, with the immaterial exception therein mentioned. By s. 18 the power of exchanging lands, whether acquired under that Act or under 39 & 40 Geo. 3, c. ciii., is vested, not in the Duke of Richmond for the time being, but in the trustees with the approbation and consent of the Duke for the time being. By s. 20 estates purchased in Scotland are to be settled in a special form of entail set out in the Second Schedule to the Act, a form by which it is specially provided and declared that it shall not be lawful to nor in the power of the then Duke of Richmond and Lennox, or the heirs male of his body, or the other heirs of tailzie, to alter the said tailzie or order of succession, or to make or do any act or deed which can be construed or infer any innovation or change thereof directly or indirectly.

By the Duke of Richmond's Estate Act, 1868 (31 & 32 Vict. c. iv.) (Private), s. 2, the trustees were empowered to sell the lands specified in the Second Schedule thereto. By s. 5 notice in writing of any such sale is to be given to the Crown, accompanied by a valuation of the lands signed by some surveyor approved by the Commissioners of Woods and Forests and Land Revenues, and no sale for a sum less than the valuation can take place without the consent of the Commissioners. By s. 6 the trustees are to invest the proceeds of the sales in the purchase of lands to be assured to such uses, such estates and under and subject to such of the powers, restrictions, provisions, and directions in and by or by virtue of the Acts of 39 & 40 Geo. 3, c. ciii. and 1 Vict. c. xxxiv. respectively declared, contained, limited, or created of, in, or concerning the lands mentioned in the First Schedule to the Act of 1 Vict. c. xxxiv. as were subsisting at the date of the Act. It is clear, therefore, that these estates are held upon the terms of a statutory settlement, and not in any sense for an estate tail as if under a conveyance at common law. When the Duke of Richmond looks to the title of the Goodwood estates he finds, not a conveyance limiting them to himself and the heirs or heirs male of his body—he finds a number of statutes conferring upon him a conditional fee regarded as inalienable by the statutes conferring it, and limiting an ultimate reversion to the Crown. The estates were purchased under the powers and subject

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to the limitations of the Acts of 39 & 40 Geo. 3, c. ciii., and the Duke of Richmond's Estate Act, 1868, the latter of which Acts refers back to the former, which in its turn refers back to the Act of 39 & 40 Geo. 3, c. 43, which confirmed the indenture made under the Act of 39 Geo. 3, c. lxxxiv. The title to these estates, therefore, depends upon the construction of the last-mentioned statute, which by s. 2 limits the ultimate reversion to the Crown, and by s. 3 provides that the Duke is to have the same and no other estate in the annuity as he had in the coal duty, which estate, as appears from the statute of 30 Geo. 2, c. x., No. 34, could not be enlarged, and therefore could not be aliened, without the authority of Parliament. As further indications of the intention that the estate in the duty, which was granted to support the honour and dignity of the dukedom, was a special statutory and alienable estate, it may be mentioned that this duty was personal property: *Earl of Stafford* v. *Buckley* (1); *Aubin* v. *Daly* (2); *Radburn* v. *Jervis* (3); and that a grant of personalty to a man and the heirs of his body, unless made by statute, could only have the effect of vesting the absolute interest in the first grantee: *Williams* v. *Lewis*. (4) Moreover, the fact that by the statutes of 39 & 40 Geo. 3, c. 43, and 39 & 40 Geo. 3, c. ciii., the First Lord of the Treasury is a perpetual trustee of this statutory settlement shews an intention that it should be inalienable.

It follows that the Duke of Richmond is not an actual tenant in tail within the meaning of s. 15 of the Fines and Recoveries Act, 1833: *Fitzgerald* v. *Champneys* (5), per Page Wood V.-C. Even if the Duke of Richmond is an actual tenant in tail within the meaning of s. 15 of the Fines and Recoveries Act, 1833, he is excluded from the operation of that section by s. 18. It is true that since the case of *Duke of Grafton* v. *London and Birmingham Ry. Co.* (6) it must be admitted that the grant of the coal duty, now represented by the Goodwood estates, was not made as a recompense for any service rendered by the grantee to the Crown

(1) 2 Ves. Sen. 171.
(2) (1820) 4 B. & Ald. 59.
(3) (1840) 3 Beav. 450.
(4) (1859) 6 H. L. C. 1013, at at p. 1020.
(5) (1861) 2 J. & H. 31, at p. 54.
(6) 5 Bing. N. C. 27.

within the meaning of the statute 34 & 35 Hen. 8, c. 20, although before that case it was generally supposed that a grant from the Crown was enough to make the gift inalienable: Co. Lit. 372b; *Perkins* d. *Vowle* v. *Sewell* (1); Cruise, Dig. tit. 36, ch. 10, s. 41, vol. 5, pp. 414–5. But be that as it may, s. 18 of the Fines and Recoveries Act, 1833, contemplates tenants in tail who are restrained from barring their estates tail by that of any other Act.

Apart from the provisions of the Fines and Recoveries Act, 1833, the Duke of Richmond has no power to bar the reversion which is vested in the Crown: *Thomas Holt's Case* (2); *Blosse* v. *Lord Clanmorris* (3); *Neal* d. *Duke of Athol* v. *Wilding* (4); Dyer, p. 32, pl. 1, and note 1 in margin; Chitty on the Prerogative, p. 379; Preston on Conveyancing, vol. 1, p. 19; Preston on Abstracts of Title, vol. 3, p. 183; Challis on Real Property, 2nd ed. p. 296, note. The statute of 34 & 35 Hen. 8, c. 20, is itself an authority on this point.

It may be admitted that an estate is not by the mere fact of being limited by statute made inalienable; if an estate tail is limited by statute, it is alienable as if it had been limited by deed. But even if this estate had been limited by deed, the reversion in the Crown could not have been barred, because it is provided by s. 3 of the statute 39 Geo. 3, c. lxxxiv., that the Duke of Richmond is to have the like estate in the annuity of 19,000*l.* as he had in the coal duty. Now this coal duty was not a "tenement" within the meaning of the Statute De Donis: Co. Lit. 19b, 20a; *Aubin* v. *Daly* (5); *Radburn* v. *Jervis* (6), a case relating to this very coal duty; *Earl of Stafford* v. *Buckley* (7); *In re Rivett Carnac's* (*Sir J.*) *Will* (8), per Chitty J. The estate which the first Duke of Richmond had in this coal duty was a conditional fee at common law: Bl. Com. 21st ed. vol. 2, pp. 110–11. In such a case when the condition—i.e., that there should be issue born who could take under the grant—was fulfilled, the grantee could alien his estate so as to bar his

(1) (1768) 4 Burr. 2223; 1 W. Bl. 654.
(2) (1612) 9 Rep. 131b, at p. 132b.
(3) (1821) 3 Bli. 62.
(4) 1 Wils. 275.
(5) 4 B. & Ald. 59.
(6) 3 Beav. 450.
(7) 2 Ves. Sen. 171.
(8) (1885) 30 Ch. D. 136, at p. 141.

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own issue, but he could not bar the reversion in the Crown: *Thomas Holt's Case* (1); *Earl of Stafford* v. *Buckley* (2); *Blosse* v. *Lord Clanmorris.* (3)

The result is that this case does not fall within s. 2 of the Finance Act, 1894, but falls, if at all, within s. 5, sub-s. 5, and that estate duty is not payable upon the principal value of the Goodwood estates, but only in respect of the interest of the defendant, the successor to the sixth Duke of Richmond, Gordon and Lennox, valued in like manner as for the purposes of succession duty, that interest being a life interest, or, at the utmost, a base fee with an unbarrable reversion in the Crown.

Vaughan Hawkins, in reply. The fact that the statutes limit an ultimate reversion to the Crown cannot afford any support to the argument for the defendant trustees. All land is held of the Crown. If the Crown grants land to a man and the heirs of his body, there is by the nature of the grant a reversion in the Crown: Wright on Tenures, pp. 115, 137, 147, 186. The mere fact that this is stated in an Act of Parliament does not make the estate tail inalienable. So in the case of an annuity; if the King grant an annuity to a man and the heirs of his body, then on failure of issue of the grantee the annuity may be said, by an inaccurate figure of speech, to revert to the Crown, though in truth the annuity simply ceases. If this is stated in an Act of Parliament the annuity does not thereby ipso facto become inalienable.

It requires very clear and distinct terms to make property inalienable: *Davis* v. *Duke of Marlborough.* (4) No such terms can be found in any of the statutes in this case. The result is that the late Duke of Richmond was actual tenant in tail within the meaning of s. 15 of the Fines and Recoveries Act, 1833, and is not excluded from the operation of that enactment by s. 18 of the same Act; that he was therefore at the time of his death competent to dispose of these estates; and therefore the defendant the present Duke of Richmond is liable for estate duty.

Cur. adv. vult.

(1) 9 Rep. 131b, at p. 132b.
(2) 2 Ves. Sen. 171, at p. 180 (marg. p. 181).
(3) 3 Bli. 62.
(4) (1818) 1 Swans. 74.

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July 30. BRAY J. read the following judgment:—In this case the Crown claimed that estate duty became payable on the death of the late Duke of Richmond in September, 1903, upon the principal value of the Goodwood estates and certain securities standing in the names of the defendants the trustees, to which the late Duke had been entitled as tenant in tail male. It was conceded by all the defendants that if the late Duke could have barred the entail the duty claimed by the Crown would have been payable, but the positions taken up by the defendants were different. The Solicitor-General, appearing on behalf of Sir H. Campbell-Bannerman, Sir Robert Fitzhardinge Kingscote, and Horace Peel (hereinafter called the defendants the trustees), contended—(1.) on behalf of all the trustees that the estates were inalienable, and that the late Duke could not have barred the entail, and, consequently, under the provisions of s. 5, sub-s. 5, of the Finance Act, 1894, duty was payable, not on the principal value, but only on the interest of his successor, the defendant the present Duke; and (2.) on behalf of Sir H. Campbell-Bannerman, the First Lord of the Treasury, as representing the Crown, that the Crown had an ultimate reversion which could not be barred.

The position taken up by the defendant the present Duke of Richmond is shewn by his answer to the 14th interrogatory. He said he was advised that his father could have barred the entail and that he would have been willing to pay the full duty, but as his trustees contended that there was no power to bar the entail he could not admit that the full duty was payable. The contention of his counsel before me was that the late Duke was competent to bar the entail. The question depended, first, on the true construction and effect of certain letters patent by which King Charles II. granted to his son Charles Duke of Richmond and Lennox, then an infant of three years, certain payments of twelve pence per chaldron of coal (which I will call, simply as a convenient expression, coal duties) on all coal, shipped, carried or vended (subject to an exception which need not be further referred to) by any person out of the river or haven of Tyne belonging to the town of Newcastle; secondly, on an Act of Parliament, 30 Geo. 2, c. x., No. 34, for varying the limitations in the

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letters patent; thirdly, on three Acts of Parliament passed about the year 1800, by which these coal duties were converted into annuities, and the proceeds of the annuities invested in the Goodwood estates and other securities; fourthly, on two later Acts dealing with these estates and the powers of the tenants in relation thereto.

Before one can arrive at the true construction and effect of the letters patent it is necessary to see what these coal duties were, and particularly whether they were realty or personalty. If personalty, they would not be within the Statute De Donis, and could have been disposed of by the donee, at all events as soon as he had an heir of his body. If realty, so as to come within the word "tenementa" in the Statute De Donis, they could have been entailed. Now, as to whether these coal duties were personalty or realty one cannot help seeing that by the letters patent, and especially by the Act of George II., and the recitals in the later Acts, they were at all events assumed to be and treated as entailable, and, as their nature is more or less obscure, I think I ought to make every reasonable presumption in favour of their being realty and entailable. As to their origin and nature, it would seem that they originated in a grant by a body called "the governor, and stewards, and brethren of the fellowship of the hostmen of the town of Newcastle-upon-Tyne," made "with the consent of the mayor and burgesses of Newcastle to Queen Elizabeth, dated April 8, forty-two Elizabeth." This grant recited certain letters patent dated a few days earlier, viz., March 22 of the same year, confirming and granting certain privileges to the hostmen and the corporation in relation to the loading and unloading of coal within the river Tyne. From a perusal of these grants and of Hargrave's Law Tracts, which contain Lord Hale's treatise on Customs, including a chapter (No. 25), "Concerning the Customes of Newcastle Coals, its Original and Progress," it would seem that the hostmen or the corporation, or both (they were probably practically the same body), had the exclusive privilege of lading, unlading, charging, and discharging coals, not only at and near the town of Newcastle, but anywhere within the port of Newcastle, which extended seven miles down the river Tyne. This was one, at all

events, of the privileges confirmed and granted to them by Queen Elizabeth. Having, therefore, this exclusive power within the port, they would be able to exact from the owners of ships or coal, or both, whom they allowed to load and unload certain payments (what those payments might be does not appear), and out of the money they would so collect they were willing to pay, and agreed to pay by their grant of April 8, forty-second year of Elizabeth, to Her Majesty these coal duties of twelve pence per chaldron. These duties seem to have been validated by an Act of 12 Car. 2, c. 4.

Now, can these duties be said to be "tenementa" within the Statute De Donis? In Coke upon Littleton, vol. 1, folio 20a, Lord Coke, dealing with this statute, says: "'Tenements,' tenementa. This is the only word which the said statute of Westminster II., that created estates tail, useth; and it includeth not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of these inheritances or concerning or annexed to, or exerciseable within the same though they lie not in tenure, therefore all these without question may be entailed. . . . . But if the grant be of an inheritance merely personal or be exercised about chattels, and is not issuing out of land nor concerning any land or some certain place, such inheritances cannot be intailed because they savour nothing of the realtie." I think, apart from the statute of George II., I should have come to the conclusion that these duties were realty and entailable as issuing out of or concerning some certain place, viz., the port of Newcastle.

Now I proceed to consider the statute of 30 Geo. 2, c. x., No. 34. It is "an Act for varying and postponing certain limitations in a grant made by King Charles II. of a duty on coals shipped in the river Tyne to Charles late Duke of Richmond and Lenox, and for enabling the present Duke of Richmond, Lenox, and Aubigny to make a jointure on his intended marriage with Lady Mary Bruce." It begins by reciting the grants made by Charles II. of these coal duties, including the grant to the Duke of Richmond, and then comes the recital: "And whereas . . . . the said Charles now Duke of Richmond, Lenox, and Aubigny became seised to him and the heirs of the body of the first

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Charles Duke of Richmond and Lenox in tail general of the said duty of twelve pence per chaldron." There is, therefore, a direct recital that these duties were entailed, and a direct enactment that they shall be entailed, and the descent in which they shall go is designated, and by the saving clause the King and all persons claiming through the first Duke are bound. It seems to me that, at all events after the passing of this statute, these coal duties must be treated as an entailable inheritance and a tenement within the Statute De Donis.

I think it will be convenient to stop here and consider the question whether immediately after the passing of this Act the tenant in tail could have barred the entail, because there are passages in this Act relied on by the defendants the trustees. There is, first, the recital that the limitations in the said grant cannot be varied without the aid and authority of Parliament, which is said to amount to a recital that the entail could not be barred; and, secondly, the fact that it was thought necessary to have an Act of Parliament when everything could have been carried out by barring the entail and resettling the duties. I think the answer to these points is this—no case had at that time, so far as I can find, decided that the statute of 34 & 35 Hen. 8, c. 20, did not apply to the grants made by Charles II. to his illegitimate sons, the first case being *Perkins* v. *Sewell* (1) in the year 1768. Further, it was more than doubtful whether the reversion of the Crown could be barred by fine and common recovery, and there might also well have been a doubt whether these coal duties were entailable. So far as I can see, in the then state of the law, it was not unnatural that the owner of these coal duties, wishing to vary the limitations, should go to Parliament for an Act, in which case this common form recital would be inserted as a matter of course. I do not think it can be said that this recital amounted to a declaration having the force of law that the entail could not be barred. Then there is the enactment defining the future limitations, but it is stated that the effect of that is to be the same as if they had been originally inserted in the letters patent, so that, if the entail could have been barred before the Act, why could it not be after? I do not attach any

(1) 4 Burr. 2223.

importance to the words that follow, "Subject to the same privileges, advantages, protections, and restrictions as if this Act of Parliament had never been made." These are general words probably inserted to shew that it was intended that all the rest of the provisions in the letters patent should continue, including the special powers given for enforcing the payment of the duties. In the view that I take of this case it is not necessary for me to decide whether after the passing of this Act the entail could have been barred, nor whether, if it could have been, the reversion of the Crown could have been barred, because I think the case turns upon the true construction of s. 15 of the Fines and Recoveries Act; but the opinion I have formed is that the entail could have been barred, but probably not the reversion of the Crown.

I come now to the next statute, 39 Geo. 3, c. lxxxiv. It was thought desirable, apparently, that duties like these should belong to the Crown instead of being in private hands, and the only way to take them out of private hands was to purchase them. So the Treasury by this Act are authorized to treat and contract with the Duke of Richmond for their purchase. The price is to be paid in the form of annuities chargeable upon the Consolidated Fund. The Act begins by reciting the letters patent and the Act of George II., and states that the duties were vested in the then Duke of Richmond (the same Duke referred to in the Act of George II.); and, after describing the line of descent, it recites that the ultimate reversion in the said duties is vested in His Majesty. (This is the first time there is any express mention of the reversion in the Crown.) Then by the 1st section it authorizes the purchase and directs the payment of the annuity to the then Duke of Richmond and the heirs male of his body, and then, in default of such heirs male, to the different persons designated by the Act of George II. Sect. 3 is important. It provides: "And be it further enacted, and it is hereby declared to be the true intent and meaning hereof, that the said Charles now Duke of Richmond, and the heirs male of his body, and the said Lord George Henry Lennox and the heirs male of his body, and the heirs of the body of the said Charles first Duke of Richmond respectively, shall

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have such and the like and no larger or other estate, title, power of disposition, or alienation and interest of and in the said annuity, as they respectively had of and in the sums or duties hereinbefore mentioned; and the said annuity shall go and be paid from time to time to such person or persons as would have been entitled to the said sums or duties in case this Act had not been made." I think the effect of this Act, so far as regards the question I have to consider, is simply to substitute the annuities for the coal duties. If the coal duties were entailable, so were the annuities to be. If the successive tenants in tail were not competent to bar the entail in the case of the coal duties, neither would they be in the case of the annuities. There was a great deal of argument before me that in the case of annuities there could be a conditional fee and as to what the effect of this would be; but it seems to me to be unnecessary to consider this, as I have found that the coal duties were entailable. The statute certainly did not intend that the annuities should be less entailable than the coal duties. Sect. 3 seems clear as to this.

The next Act was 39 & 40 Geo. 3, c. 43, which is entitled an Act to confirm an agreement entered into between the Commissioners of His Majesty's Treasury and the Most Noble Charles Duke of Richmond in pursuance of an Act passed in the thirty-ninth year of the reign of His present Majesty, intituled, An Act to enable the Commissioners of the Treasury to contract with the Most Noble Charles Duke of Richmond for the absolute purchase of the property of the said Duke, and of all others interested in a certain duty of twelve pence per chaldron on coals shipped in the river Tyne to be consumed in England and to grant a compensation for the same by way of annuity payable out of the Consolidated Fund. The effect of the Act was to confirm the agreement by which the annuities were fixed at 19,000*l.*, and to direct that the annuities should be paid in succession to the persons designated; but here, again, it expressly provided that, in default of heirs of the body of the first Duke, the annuity should belong and revert, or be considered as reverting, to His Majesty. Sect. 7 gave power to the Duke after the year 1808 to require the annuities to be funded or redeemed, in which case the money was to be invested in the names

of the Lord High Treasurer or the First Lord of the Treasury for the time being, and certain other named persons who were to be trustees for the persons who would have been entitled to the annuities. I do not think there is anything of importance in that Act affecting the present question.

The next Act was 39 & 40 Geo. 3, c. ciii., which enabled part of the annuities or stocks to be sold and invested in land and certain jointures to be created. It recited all that had gone before, and proceeded first to enact that certain jointures and annuities might be created. Then came s. 10, which gave power to the trustees referred to in the previous Act to sell part of the annuities and lay out the money in the purchase of land, and it directed that the said lands when so purchased should be forthwith settled, conveyed, and assured to the use of such persons and for such estates as the said annuity of 19,000*l.* would by virtue of the limitations in that Act contained have stood limited in case the same had not been funded and redeemed. Provided (s. 12) that such lands should not be subject to dower. Then followed sections which were much relied upon by the defendants the trustees as shewing that these lands so purchased would be inalienable. Sect. 13 relates to powers of leasing; s. 14 to the liability of the person in possession for waste; and s. 15 provides that no timber is to be cut down otherwise than in the manner authorized; and there followed strict provisions by which the timber before being cut was to be marked by a surveyor, and when cut it was to be done by the direction of the trustees, and the proceeds were to be paid to them and dealt with by them in a certain way for the benefit of younger children. It was under the powers given by this Act that almost the whole of the present Goodwood estates were bought and conveyed to the predecessors of the defendants the trustees, the form of conveyance being in each case in these words: "To have and to hold the said mansion house manors messuages farms lands tenements rectories advowsons hereditaments and all and singular other the premises hereinbefore granted and released or expressed and intended so to be with their rights members and appurtenances unto the said Spencer Perceval Henry Earl Bathurst George Berkeley Cropley Ashley

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Cooper and Thomas Steele their heirs and assigns To the Use of such persons and for such estates as the whole of the aforesaid annuity of 19,000*l.* would by virtue of the limitations in the said secondly hereinbefore recited Act of Parliament of the thirty-ninth and fortieth years of the reign of His present Majesty contained have stood limited in case no part thereof had been funded and redeemed and under and subject to the powers provisoes trusts and all other provisions in the same Act contained touching or concerning the estates to be purchased in pursuance thereof."

This was how matters stood at the date of the passing of the Fines and Recoveries Act. Sect. 15 of that Act enabled every actual tenant in tail to bar the entail, and that against all persons, including the Crown, saving, of course, the rights of persons having prior interests. Sect. 18 provided that this power should not extend to tenants in tail, who, by the Act of 34 & 35 Hen. 8, c. 20, entitled an Act to restrain feigned recovery of lands, wherein the King is in reversion, or by any other Act, are restrained from barring their estate tail or to tenants in tail after possibility of issue extinct. Two questions arise under this statute: (1.) Was the late Duke an "actual tenant in tail" within the meaning of s. 15? (2.) Was he by any other Act restrained from barring the entail, it being admitted by the defendants that the coal duties were not given by Charles II. for services rendered so as to come within the Act of Henry VIII.? With regard to the first point, it was strongly urged on behalf of the defendants the trustees that the late Duke of Richmond was not such an actual tenant in tail, because his interests in the estates were entirely created and governed by Acts of Parliament, which required that the estates should go in a particular succession, and that the Fines and Recoveries Act could not repeal the special limitations in those Acts of Parliament; and, secondly, because there was a special reversion in the Crown, also created, or, at all events, confirmed, by Act of Parliament. Now I think it is clear (and the contrary was not argued) that the mere fact that the estate tail was created or governed by an Act of Parliament does not prevent the tenant being a tenant in tail within the statute. I have no right to insert in s. 15 the words "except the tenants

in tail under an Act of Parliament," and s. 18 itself seems to contemplate such tenants in tail falling within s. 13, unless there is a prohibition against alienation. Is there, then, anything special in the tenancy in tail of these estates? I can see nothing except the difficulty created by the nature of the coal duties; but I have got over that difficulty, rightly or wrongly, by coming to the conclusion that the coal duties were entailable, and if there had been any such difficulty after the passing of the Act of George II., I think there is much force in Mr. Danckwerts' argument that the difficulty disappeared after the passing of the Act of 39 & 40 Geo. 3, c. ciii., which by s. 11 expressly directed that the lands "shall, when so purchased, be forthwith settled, conveyed, and assured to the use of such persons and for such estates as the said annuity of 19,000*l.* would by virtue of the limitations in this Act contained have stood limited in case the same had not been funded and redeemed."

Great stress was laid by Mr. Rowlatt on s. 3 of 39 Geo. 3, c. lxxxiv., and it was said that Parliament had designated a particular line of succession; but the line of succession designated was only a repetition of that which had been laid down by the Act of George II. and was only such a line of succession as you would expect to find in any settlement where it was intended that the property should be strictly entailed. If the entail had been by settlement instead of by Act of Parliament, the entail could have been barred; and once granted that s. 15 of the Fines and Recoveries Act will cover cases where the entail is by Act of Parliament, I can see no reason why a tenant in tail under this entail is not a tenant in tail within s. 15. All that this Act of George III. really directed was that the annuities should go to the same persons and in the same manner as the letters patent (recited by the Act of George II.) had directed that the coal duties should go. It seems to me substantially only to substitute the annuities for the coal duties.

I must confess, however, to having been struck on reading these Acts with the impression that those who were responsible for their drafting all thought that the property, whether it was coal duties, annuities or land, was inalienable. What is the explanation of this? I have dealt with the Act of George II., and

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with regard to the other Acts, I can well understand that it should be thought that once the estates had been dealt with by an Act of Parliament another Act would be necessary if further powers were sought, and it must be remembered that the authority of Parliament was certainly required for the conversion of the coal duties into annuities, and to confirm the contract made between the Duke and the Treasury. This would not account for the last Act (39 & 40 Geo. 3, c. ciii.), but it was passed about the same time as the others, and I daresay was part of the scheme. Further, it must be remembered that the case of *Duke of Grafton* v. *London and Birmingham Ry. Co.* (1) had not then been decided, and there might well have been a doubt as to the true construction of the Act of Henry VIII., notwithstanding the case of *Perkins* v. *Sewell.* (2) Then, also, there was the difficulty of the Crown's reversion, which, according to that case, could not be affected by the barring of the entail. I think this is the true explanation of these Acts. I have tried, but cannot fasten on anything in these Acts which justifies me in saying that Parliament intended that this entail should be different from any other entails created by other royal grants, and if the entail in the *Duke of Grafton's Case* (1) fell within s. 15 of the Fines and Recoveries Act, why should not this? Perfectly general words are used in s. 15, "every actual tenant in tail," and when the Legislature intends to make exception it does so by s. 18. Why was not the late Duke of Richmond such a tenant in tail? I can see no sufficient reason for saying that he was not.

There remains, however, the point that the Crown's reversion is specially referred to in more than one of the Acts. Now I assume that Mr. Rowlatt's argument is sound that before the Fines and Recoveries Act no private person could bar the Crown's reversion; but s. 15 says "every actual tenant in tail" shall be able to bar the reversion in the Crown. It assumes that there are cases which are to fall within that section in which the Crown has a reversion, and yet that reversion is to be barred. Can I make an exception here because in several of these Acts of Parliament the Crown's reversion is specially mentioned? I cannot see that I ought. I come, therefore,

(1) 5 Bing. N. C. 27. (2) 4 Burr. 2223.

to the conclusion that the late Duke was a tenant in tail within s. 15.

Then I have to consider whether his case falls within the cases excepted by s. 18. It is clear that these Acts contain no express provision against alienation. Can I imply one? I do not see that I can. There is nothing more to be found in these Acts than that which I have before referred to, viz., indications that those who drafted them thought there was no power of alienation. I do not think this is enough.

All that remains to be considered is the two Acts of 1 Vict. c. xxxiv. and 31 & 32 Vict. c. iv. These are Acts conferring further powers on the trustees. They certainly do not contain any prohibition, express or implied, against alienation, and if the entail could be barred after the passing of the Fines and Recoveries Act they do not take away that power. They undoubtedly confirm the impression left upon my mind that those who were dealing with these estates thought that Parliament, and Parliament alone, could give the trustees further powers; but I have dealt with that, and I come to the conclusion that that is not sufficient reason for saying that the late Duke was not an actual tenant in tail within s. 15 of the Fines and Recoveries Act. I do not think the position is altered by these Acts. My judgment must, therefore, be for the Crown, that estate duty is payable on the principal value of these estates.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

Solicitors for the Duke of Richmond: *Burch, Whitehead & Davidsons.*

Solicitor for the trustees: *The Solicitor to the Treasury.*

The following copy of the grant of April 8, 1600, stated at p. 943, ante, is taken from vol. cv. of the Publications of the Surtees Society, p. 17:—

"To all Xrian People to whom this p̃nte. writinge shall come, The Governor and Stewards and Brethren of the Fellowship of the Hostmen of the Towne of Newcastle upon Tyne, in the Countye of the Towne of Newcastle upon Tyne, Send Greetinge in our Lord God Everlastinge.

"Whereas y^{t} hath alwaies pleased the Quenes most excellent Ma^{tie} of her gratious and pryncely inclynation, from tyme to tyme most

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gratiouslie to affect and tender the good Estate of the said Towne of Newcastle and the Inhabytants thereof, And of late of her further Grace for the generall profytt and comoditye of the same Towne by her Highnes Lres. patent, bearinge date at Westmynster the Two and Twentith day of March, in this pñte. two and fortith year of her Ma^te Reigne, y^t hath pleased her Highnes gratiouslie to confirme and grante as well unto us, the said Governor and Stewards and Brethren of the Fellowship of the Hostmen of Newcastle aforesaid, and o^r Successors, as also to the Maio^r and Burgesses of the same Towne, and ther Successors, divers and sondrie Immyties. (1) and priviledge w^th confirmacoñ of the Auntient Liberties of the said Towne, and w^th Dispensacoñ of sondry Statute and release of the forfeitures specyfied in the said Statute princypallie for and concerninge the loading and unloadinge of Sea Cole and Stone w^th in the Ryver of Tyne as in and by the said Letters patente more fullye y^t dothe and may appeare. Nowe know yee therfore, that we, the foresaid Governor and Stewardes and Brethren of the Fellowshipp of the Hostmen aforesaid, w^th the consent, good lykinge, and approbacon of the Maior and Burgesses of the same Towne for the tyme beinge in regard of their gratious and most princelye favours and benignities, being desyrous to o^r uttermost powers to shewe o^rselves thankfull for the same, And not being Ignorante of the greate, insupportable and excessive charge w^ch her Highnes hath of late susteyned and likelye to be at in and for the defence of this Realme and her Highnes pore subiect against the malice and force of the enimyes of this Realme, Have given and granted, and by these pñte. for us and o^r successors do in all humylitye give and grant unto her most excellent Ma^tie, her heires and successors, to the use of her Ma^tie, her heires and successors, for ever, for each and every and for such and so manye Chaldron and Chaldrons of Sea Cole, Stone Cole, or pytt Cole, of the Water Measure of Newcastle upon Tyne aforesaid as at any tyme or tymes hereafter shall be sold, shipped, caried, or vented by any person or psons. whatsoever forth or out of the Haven or Ryver of Tyne belonginge to the foresaid Towne of Newcastle, to be spente w^hin this Realme and not transported beyond the Seas. The severall some of Twelve pence of lawfull money of England to be paid by us and o^r successors unto o^r said Sovereigne Ladie, her Heires and Successors, before any Shipp or other Vessell wherin any such Coles shall be Laden shall at any tyme or tymes hereafter be cleared or discharged forth of her Ma^tie Custome house in the said Towne of Newcastle, Coles sould and caryed from the said porte of Newcastle to Hartlepooll to be ymploied and spent in and about such Salte pans as nowe be w^h in Hartlepooll aforesaid and apperteyninge to the Right Honorable the Lord Lumley, his Heires and Assignes, or any of the Burgesses of the said Towne of Newcastle only excepted.

"And further, we, the said Governor and Stewardes and Brethren of the Fellowshipp of the Hostmen aforesaid, do by these pñte. for us and o^r successors, covenante, promise, and grante to and with o^r said Sovereigne Ladye, the Quenes Ma^tie, her Heires and Successors,

(1) This should probably be "immūties," i.e. "immunities."—F.P.

from tyme to tyme well and trouly to yeeld and paye unto o^r^ said Sovereigne Lady, the Quenes Ma^tie^, her Heires and Successors, or to such of the Offic^rs^, Farmors, or Assignes of o^r^ said Sovereigne Ladie, her Heires and Successors, as by the Grante Comand^mt^ or direction of her Highnes, her Heires and Successors, shall from tyme to tyme be authorysed or appoynted to take, collect, and receive the same, the said some of Twelve pence of lawfull English money for each and every, and for such and so many Chaldron and Chaldrons of the said Sea Coles, Stone Coles, or pytt Coles as so at any tyme or tymes hereafter shall be sould, shipped, caried, or vented forth as is aforesaid to be spente w^h^in this Realme of England and not transported beyond the Seas (except onlie as before in these presente is excepted) w^h^out any concealm^t^ dyminucon, or other indyrect meanes or practise whatsoever.

"In wytnes wherof as well, we, the said Governor and Stewarde and Brethren of the Fellowshipp of the Hostmen of the said Towne of Newcastle upon Tyne, in the Countie of the Town of Newcastle upon Tyne, As also the Maio^r^ and Burgesses of the said Towne of Newcastle upon Tyne, have to this p̃nte. wrytinge sett o^r^ several Comon Seales yeeven at the foresaid Towne of Newcastle, the Eighte day of Aprill, in the Two and fortith yeare of the Raigne of o^r^ said Sovereigne Ladye, Elizabeth, by the grace of God Quene of England, France, and Ireland, Defender of the Faith, &c., 1600.

"Exam: per Edw^d^ Coke."

In the Petition of Grievances by the Commons to King James I. in the year 1610 the petitioners, after reminding His Majesty that "among many resemblances which are observed to be between natural and politick bodies, there is none more apt and natural than this, that the diseases of both do not at one instance commonly seize upon all parts; but beginning in some one part do by tract of time and by degrees, get possession of the whole . . . ." This resemblance, they contend, "is in nothing more apparent than in this matter of Impositions . . . . For proof whereof, we do in all humility present unto your Majesty's view the late imposition of one shilling per chaldron of sea coals, rising in Blith and Sunderland, not by virtue of any contract or grant, as in the coals of Newcastle, but under a mere pretext of your Majesty's most royal prerogative. . . . ." See Petyt, Jus Parliamentarium, ed. 1739, p. 335. (State Trials (Cobbett, 1809), Vol. 2, p. 532.)

W. H. G.

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ATTORNEY-GENERAL *v.* FELIXSTOWE GAS LIGHT COMPANY.

Revenue—Stamp—Conveyance on Sale—Dissolution of Company and Reincorporation by same Act—Vesting of Property of Old Company in New—Finance Act, 1895 (58 & 59 *Vict. c.* 16), *s.* 12.

By a special Act of Parliament a limited company was dissolved and reincorporated with additional powers, the property of the dissolved company being thereby vested in the new company, and the shareholders being given stock of the new company in substitution for the stock of the dissolved company theretofore held by them :—

Held, that the property of the dissolved company "vested by way of sale" in the new company within the meaning of s. 12 of the Finance Act, 1895, notwithstanding that there was no contract of sale between the two companies by reason of their never having been in existence at the same time.

Special Case stated by Consent.

By s. 12 of the Finance Act, 1895, it is enacted as follows: "Where after the passing of this Act, by virtue of any Act, whether passed before or after this Act, either (*a*) any property is vested by way of sale in any person, or (*b*) any person is authorized to purchase property, such person shall within three months after the passing of the Act, or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the ad valorem duty payable upon a conveyance on sale of the property; and in default of such production the duty with interest thereon at the rate of 5 per cent. per annum from the passing of the Act, date of vesting, or completion of the purchase, as the case may be, shall be a debt to Her Majesty from such person."

The Felixstowe Gas Act, 1904 (4 Edw. 7, c. ccxv.), contains the following recitals and provisions :—

"Whereas in the year 1883 certain persons formed themselves into a company under the name of the Felixstowe Gas Light

Company, Limited (in this Act referred to as 'the limited company'), for the purpose of, amongst other things, supplying gas to the town of Felixstowe, in the county of Suffolk, and the neighbouring places, and such company was duly registered under the Companies Act, 1862;

"And whereas by the Felixstowe Gas Order, 1895 (confirmed by the Gas Orders Confirmation Act, 1895, s. 2), the limited company were empowered to maintain and continue their gas-works, and to supply gas in the parishes of Walton and Felixstowe, in the county of Suffolk;

"And whereas the share capital of the limited company authorized by the order of 1895 consists of—

"(A.) 1594 shares of 5*l.* each, and entitled under the order of 1895 to a preferential dividend of 5 per cent. per annum, being the number of shares required to raise with the premiums thereon the sum of 8000*l.*;

"(B.) 1800 shares of 5*l.* each, being the original capital of the limited company, and entitled under the order of 1895 to a fixed maximum dividend of 10 per cent. per annum; the whole of which capital has been subscribed and fully paid up, and the limited company have borrowed on mortgage of the undertaking and now owe the sum of 4000*l.*;

"And whereas it is expedient that the limited company should be dissolved and reincorporated with further powers, ..."

Sect. 5. "From and after the passing of this Act the limited company shall be dissolved, and the several persons who immediately before the passing of this Act were members of that company and all other persons who have subscribed to or who shall hereafter become proprietors in the undertaking, and their executors, administrators, successors, and assigns respectively, shall be, and are hereby, united into a company for the purposes hereinafter mentioned, and shall be, and are hereby, incorporated by the name of 'The Felixstowe Gas Light Company,' and by that name shall be a body corporate with perpetual succession and a common seal, with power to purchase, take, hold, and dispose of lands and other property for the purposes of this Act or of their undertaking."

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Sect. 7. "Subject to the provisions of this Act, all the lands, gas works, erections, buildings, rights, and easements, which immediately before the passing of this Act were vested in the limited company or any person in trust for them, or to which the limited company were in anywise entitled, and all mains, pipes, plant, plugs, lamps, irons, retorts, gauges, meters, lamp-posts, syphons, apparatus, stock, effects, matters, and things which have been by them purchased, provided, laid down, erected, or placed in any place or house within the limits of this Act, or which immediately before the passing of this Act were the property of the limited company, and all moneys, securities, credits, effects, and other property whatsoever which immediately before the passing of this Act belonged to the limited company or to any trustee on their behalf, and the benefit of all contracts and engagements entered into by or on behalf of the limited company, and immediately before the passing of this Act in force, shall be, and the same are hereby, vested in the company to the same extent and for the same estate and interest as the same were previously to the passing of this Act vested in the limited company or any trustee on their behalf, and may, according to the provisions of this Act, be held and enjoyed, sued for and recovered, maintained, altered, discontinued, removed, dealt with, and disposed of by the company as they think fit."

Sect. 13. "From and after the passing of this Act, and except as is by this Act otherwise expressly provided, the company shall in all respects be subject to, and shall discharge, all obligations and liabilities to which the limited company immediately before the passing of this Act were subject, and shall indemnify the members, directors, officers, and servants of the limited company and their respective representatives from all such obligations and liabilities and from all expenses and costs in that behalf."

Sect. 20. "The capital of the company shall be 49,970*l.*, whereof 7970*l.* shall be preference stock, representing the existing preference capital of the limited company, 9000*l.* shall be ordinary stock, representing the existing ordinary capital of the limited company; and 33,000*l.* shall be the additional capital, to be raised in manner hereinafter mentioned."

Sect. 21. "(1.) The said sum of 9000*l.* ordinary stock shall

be divided among and vested in the several persons who immediately before the passing of this Act were registered as the holders of the ordinary capital of the limited company, their executors, administrators, and assigns, in proportion to their respective holdings in the capital of the limited company, and the sum of 7970*l.* preference stock shall in like manner be divided among and vested in the several persons who immediately before the passing of this Act were registered as the holders of the preference shares of the limited company.

"(2.) Upon the passing of this Act there shall be created by virtue of this Act sufficient preference and ordinary stock to give effect to the provisions of this section."

On behalf of the Attorney-General it is contended—(1.) that by virtue of the said Act the property of the old company was vested in the defendant company; (2.) that the consideration for the sale was (*a*) the liabilities assumed by the defendant company by virtue of s. 13 of the Act, those liabilities amounting to 5841*l.*; (*b*) 7970*l.* preference stock and 9000*l.* ordinary stock vested by virtue of s. 21, the value of the said stocks to be taken at the value they bore at the passing of the said Act and being 17,870*l.*; (3.) that the defendant company ought to have produced a King's printer's copy of the said Act duly stamped, in accordance with 58 & 59 Vict. c. 16, s. 12; (4.) that the defendant company are liable to pay the duty as on a conveyance on sale, amounting to 118*l.* 15*s.*, together with 5 per cent. interest, until payment as is provided by the said 58 & 59 Vict. c. 16, s. 12.

The defendant company have not produced any stamped copy of their Act, as required by the Finance Act, 1895. On their behalf it is contended that the property of the old company was not vested in the defendant company by way of sale, and that in consequence the Finance Act, 1895, does not apply.

On February 22, 1907, the Attorney-General filed an information claiming the said sum of 118*l.* 15*s.* and interest.

The question for the opinion of the Court is whether the defendants are liable to pay the said duty.

Cripps, K.C., and *E. F. Spence*, for the defendants. The property of the old company did not "vest by way of sale" in

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the defendant company, for under the circumstances no sale by one to the other was possible. It is said in Benjamin on Sales that "to constitute a valid sale there must be a concurrence of the following elements: 1st. Parties competent to contract; 2nd. Mutual assent; 3rd. A thing, the absolute or general property in which is transferred from the seller to the buyer; and 4th. A price in money paid or promised." There can be no sale without a contract of sale, which necessarily requires two parties in existence at the same time and mutually assenting to the transfer. Here the two companies were never in existence at the same time. The same Act which created the one extinguished the other. And the old company could not be regarded as acting as agent for the defendants in making the contract, for it is well settled that a person cannot act as agent for a non-existent company so as to bind it when it comes into existence. In *Great Western Ry. Co.* v. *Commissioners of Inland Revenue* (1), by a special Act the undertakings of two other companies were amalgamated with that of the Great Western Company, the amalgamated companies being thereby dissolved, and the shareholders of one of the two companies being given in exchange for their shares guaranteed stock of the Great Western Company, and in the case of the other company the consideration for the amalgamation being the payment by the Great Western of certain outstanding debentures, the share capital of that company being already held by the Great Western Company. It was held that the transaction was a transfer on sale, and that a copy of the Act was chargeable with duty. But in that case at the date of the Act there were two companies already in existence assenting to the transfer. In *Foster* v. *Commissioners of Inland Revenue* (2), where a firm of eight partners turned themselves into a company, and subsequently to the registration of the company, by a deed to which the company was a party, conveyed their business and property to the company, the conveying partners thereby becoming entitled to the shares of the company in certain proportions, it was held that the deed was chargeable with duty as a conveyance on sale, none the less because the

(1) [1894] 1 Q. B. 507. (2) [1894] 1 Q. B. 516.

eight partners who conveyed the property were also the individuals who constituted the company. But there again there were two parties existing at the date of the transfer. Lindley L.J. laid stress on that fact. He said: "Now the document in this case is an indenture made between eight gentlemen of the first eight parts and John Foster & Sons, Limited, ... of the ninth part. Pausing there for a moment, although the persons of the first eight parts may be, and were, members, and the only members, of John Foster & Co., Limited, John Foster & Co., Limited, is not those eight individuals; John Foster & Co., Limited, is a corporation. We have accordingly two parties, one party consisting of several individuals, and the other party consisting of a corporation." (1)

Sir W. S. Robson, S.-G., and *W. Finlay*, for the Crown. In the *Great Western Ry. Co.'s Case* (2) it would be difficult to say that at the crucial moment of the transfer there were two parties in existence, for the very same Act that brought about the transfer dissolved the vendor companies. That case clearly shews that it is not necessary that there should be a consensus of the parties at the precise moment of the transfer, and if there is no necessity for it then, it is difficult to see why there should be any necessity for it at all in the sense of an agreement between two co-existing persons.

BRAY J. In this case the Crown claims that there was a duty payable upon the transfer of the property of the Felixstowe Gas Light Company, Limited, under an Act of Parliament whereby that company was dissolved and reincorporated with further powers. The question turns upon the meaning of a few words in s. 12 of the Finance Act, 1895. That section provides that "where after the passing of this Act, by virtue of any Act, whether passed before or after this Act, any property is vested by way of sale in any person," duty shall become payable as upon a conveyance on sale according to the rate provided by the Stamp Act, 1891. Now it is quite clear, indeed it was not disputed, that the two companies were distinct persons, and that the property which

(1) [1894] 1 Q. B. 527. (2) [1894] 1 Q. B. 507.

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had belonged to the limited company by virtue of the Act vested in the new company, but the question which I have to decide is whether it so vested "by way of sale." What is necessary to constitute a sale? No doubt as a general rule it is necessary that there should be two parties; there must be a consensus between those parties; there must be a consideration and a transfer of the property. The difficulty suggested here is that the two parties were never in existence at the same time, and consequently there could be no consensus, no mutual assent of two persons meeting and agreeing together. I think, however, that the want of a consensus may be supplied by the Act of Parliament. If there was a real intention on the part of the old company to transfer the property and on the part of the new company to acquire it for consideration, and if that intention was expressed, not in an ordinary contract inter partes, but in an Act of Parliament, then the fact that the two companies were not existing at the same moment was immaterial; the Act enabled them to do that which without it they could not have done. Equally, of course, it might be said that a "transfer" means a transfer from an existing person to another existing person, and that, as these two persons never existed at the same time, there could be no transfer in the strict sense of the term. But, as I have said, I think the Act of Parliament supplies that deficiency, and that this transaction is to be treated as if it were a transfer from the one company to the other. I think colour is given to that by Lord Esher's judgment in *Great Western Ry. Co.* v. *Commissioners of Inland Revenue* (1), where he says with reference to the amalgamation of two railway companies by Act of Parliament: "The substance of such a transaction, then, would be a transfer of property for a consideration as if it were upon a contract of purchase and sale." I gather that if he had had to construe the words before me, "vested by way of sale," he would have considered them satisfied if the transfer of the property was for a consideration, as if it were upon a contract of purchase and sale. In my opinion, this property was vested by way

(1) [1894] 1 Q. B. 507, at p. 512.

of sale in the new company, and the duty is accordingly payable upon it.

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Judgment for the Crown

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Batten, Proffitt & Scott.*

J. F. C.

ATTORNEY-GENERAL *v.* YORKSHIRE (WOOLLEN DISTRICT) ELECTRIC TRAMWAYS, LIMITED.

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July 18, 19.

Inland Revenue—Carriage Licence—Cars on Light Railway—Light Railways Act, 1896 (59 & 60 *Vict. c.* 48)—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 4.

A light railway constructed under an order made under the Light Railways Act, 1896, is a "railway" within the meaning of s. 4 of the Customs and Inland Revenue Act, 1888, which exempts from the licence duty on "carriages" thereby imposed any carriage drawn or propelled upon a railway by steam or electricity or other mechanical power.

SPECIAL CASE STATED BY CONSENT.

The defendants are the owners of certain cars which run upon lines of steel rails laid upon certain public roads in Dewsbury, in the West Riding of York and in the immediate neighbourhood. No part of the lines runs over private property. The top of the rails of which these lines are constructed is level with the surface of the roadway. The wheels of the cars have a flange, similar to the flange of the wheels of an ordinary railway carriage or an ordinary tramcar, which runs in a groove in the rails. The rails in all sections of the lines are identical in character. The cars are in construction and appearance identical with ordinary tramcars run upon lines constructed under the Tramways Acts or under private Acts, and are propelled by electricity on the overhead system. The lines, which are altogether about sixteen miles in length, were all authorized by and constructed under certain orders made under the Light Railways Act, 1896. The cars above mentioned have been and are used only upon the said lines. The defendants have taken out no licence to keep a carriage in respect of any of the said cars.

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By s. 27 of the Revenue Act, 1869 (32 & 33 Vict. c. 14), every person who shall keep any carriage without having a proper licence shall be liable to a penalty.

By s. 4, sub-s. 1, of the Customs and Inland Revenue Act, 1888, it is provided that the following duties of excise for carriages shall be payable in lieu of those theretofore in force: "For every carriage as hereinafter defined, If such carriage shall have four or more wheels, and shall be drawn or be adapted or fitted to be drawn by two or more horses or mules or shall be drawn or propelled by mechanical power . . . . 2*l.* 2*s.*"

Sub-s. 3: "In the construction of this section each of the following terms has the meaning hereby assigned to it: 'Carriage' means and includes any carriage (except a hackney carriage) drawn by a horse or mule or horses or mules, or drawn or propelled upon a road or tramway, or elsewhere than upon a railway, by steam or electricity or any other mechanical power."

The Attorney-General, on behalf of the Crown, claimed penalties from the defendants for keeping the said cars without a licence.

Sir W. S. Robson, *S.-G.*, and *W. Finlay*, for the Crown. The cars in question, being propelled by electricity upon a road, are prima facie subject to the licence duty upon carriages.

Danckwerts, *K.C.*, and *Tomlin*, for the defendants. The lines upon which the cars run are a "railway" within the meaning of s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888, and the cars are therefore expressly exempted from the duty. The Light Railways Act, 1896, under which the orders authorizing these lines were made, throughout speaks of a light railway as being a railway: see especially ss. 11, 12. The latter section provides that "the general enactments relating to railways shall apply to a light railway under this Act in like manner as they apply to any other railway; and for the purposes of those enactments . . . . the light railway company shall be deemed a railway company, and the order under this Act a special Act, and any provision thereof a special enactment"; and it expressly excepts the application to light railways of the Railway Passenger Duty Act, 1842 (5 & 6 Vict. c. 79). And by s. 18, "Where a company

have power to construct or work a railway they may be authorized by an order under this Act to construct and work or to work the railway or any part of it as a light railway under this Act." Moreover, light railways were known and dealt with by the Legislature as railways before the passing of the Customs and Inland Revenue Act, 1888; and therefore, presumably, when the latter Act, in s. 4, sub-s. 3, uses the term "railway" it means to include a light railway. The Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), by Part V. deals with light railways, and provides that, like other railways, they shall be subject to the regulations of the Board of Trade. Sect. 27 (which is in almost the same terms as s. 18 of the Act of 1896) provides that "The Board of Trade may by licence authorize a company applying for it to construct and work or to work as a light railway the whole or any part of a railway which the company has power to construct or work." In *Wakefield Light Rys. Co.* v. *Wakefield Corporation* (1) it was held by the Court of Appeal, affirming the Divisional Court, that a light railway constructed under an order made under the Light Railways Act, and laid, as here, along the open streets, was a railway within the meaning of s. 211, sub-s. 1, of the Public Health Act, 1875, which provides that land "used only as a railway" should be assessed to the general district rate at one-fourth part only of its net annual value. Cozens-Hardy M.R. treated it as too plain for argument that the line of rails there was a railway and not a tramway.

Sir W. S. Robson, S.-G., in reply. A light railway such as this, which runs along a public road, and is indistinguishable from a tramway, is not a railway within the meaning of s. 4, sub-s. 3, of the Act of 1888. It is not a railway in the ordinary acceptation of the term, inasmuch as it is not enclosed by fences upon private land. The light railways which were referred to in the Regulation of Railways Act, 1868, were merely ordinary railways made on a lighter scale with a narrower gauge. At that date there were no such things as light railways running along the public streets. The *Wakefield Case* (1) is distinguishable. There the question was whether s. 211 of the Public Health Act, 1875, was a "general enactment relating to

(1) Ante, p. 256.

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railways" within the meaning of s. 12 of the Light Railways Act, 1896, which provides that such enactments shall apply to light railways, and the Court held that it was. The main argument turned upon that point, which it would have been superfluous to consider if the word "railway" in s. 211 of the Act of 1875 included a light railway without more. It only so included it because the effect of s. 12 of the later Act was to attach an artificial meaning to the term. And that artificial meaning cannot be attached in the present case, for it cannot possibly be said that s. 4, sub-s. 3, of the Customs and Inland Revenue Act, 1888, is a "general enactment relating to railways," having regard to the fact that it does not apply to railways at all. An enactment which says that railways shall be rated at a lower value than other classes of property may well be regarded as an enactment relating to railways, but not one which excludes railways wholly from its operation. A clause which said "This Act shall not apply to Scotland" could not be regarded as an enactment relating to Scotland.

BRAY J. The question in this case is whether certain cars, which run solely upon certain lines of rails belonging to the defendants and constructed under orders made under the Light Railways Act, 1896, are "carriages" within the meaning of s. 4 of the Customs and Inland Revenue Act, 1888, and subject to duty as such. Now the word "carriage" is in that section defined to mean "any carriage (except a hackney carriage) drawn by a horse or mule or horses or mules, or drawn or propelled upon a road or tramway, or elsewhere than upon a railway, by steam or electricity or any other mechanical power." Here the cars are propelled by electricity, and the contention of the defendants is that the cars are so propelled upon a railway, and therefore are not subject to duty. The question, then, which I have to decide is whether these light railways—for the lines of rails in question were admittedly light railways—are railways within the meaning of that section. At the time that the Act of 1888 was passed no doubt light railways were not constructed or used to anything like the extent to which they are now. But they were known to the Legislature at least twenty years before

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that date. The Regulation of Railways Act, 1868, dealt with light railways, and by Part V. provided that the Board of Trade might authorize a railway company "to construct and work or to work as a light railway the whole or any part of a railway which the company has power to construct or work." Therefore at that time the expression "light railways" was known, and they were treated as something distinct from a tramway, which was the subject of separate legislation passed about the same time, the Tramways Act, 1870, though no doubt at that time it was not intended, or at all events it was not usual, to construct light railways on public roads in the same manner as they are constructed now. In 1896 the Light Railways Act was passed, and without going through all the sections of that Act it is enough to say that in many of the sections a light railway is spoken of as a railway; and particularly in s. 12, sub-s. 2, it is provided that "the general enactments relating to railways shall apply to a light railway under this Act in like manner as they apply to any other railway; and for the purposes of those enactments . . . . the light railway company shall be deemed a railway company, and the order under this Act a special Act, and any provision thereof a special enactment: Provided that a light railway shall not be deemed to be a railway within the meaning of the Railway Passenger Duty Act, 1842." Now, without for the moment expressing any opinion whether the words "general enactments relating to railways" would include this section of the Customs and Inland Revenue Act, it is obvious that Parliament intended these light railways to be considered railways as distinguished from tramways. But, further, this matter has been considered by the Court of Appeal in a case which, though not precisely on all fours with the present, involved the question whether a light railway was a railway. That is the case of *Wakefield Light Rys. Co.* v. *Wakefield Corporation.* (1) The question there raised was whether light railways were entitled to the benefit allowed by the Public Health Act to the "occupier of any land used only as a railway" of being assessed to the general district rates at a portion only of their annual value. Cozens-Hardy M.R. said:

(1) Ante, p 256.

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"I do not pause to consider the question whether the line of railway which runs along the public streets of Wakefield, which is the line of railway alone we have to consider here, is a tramway or railway for the purposes of this Act. It seems to me almost too plain for argument that it is a railway and not a tramway. A light railway constructed under the Act of 1896 is repeatedly spoken of as a railway. In this very s. 12 we find these words that certain enactments . . . . 'shall apply to a light railway under this Act in like manner as they apply to any other railway,' and there are to be found in the Act many differences of a substantial kind for the benefit mainly of a light railway company as compared with a tramway company formed and carrying on its operations under the Tramways Act, 1870. I therefore feel no doubt that we must approach this question having regard to the fact that we are dealing here with a railway and not a tramway within the Act of Parliament." He then went on to deal with the question whether s. 211 of the Public Health Act was a "general enactment relating to railways" within the meaning of s. 12 of the Act of 1896, and held that that expression meant "an enactment in a statute not making special reference to any particular railway, but dealing with all railways without exception," and that the section in question was such an enactment. Then, applying that test here, is the definition of "carriage" in the Customs and Inland Revenue Act a "general enactment relating to railways"? So far as it applies to railways at all, it applies to all railways. It gives a complete exemption to carriages propelled by mechanical power upon any railway. If s. 211 of the Public Health Act is a general enactment relating to railways, I cannot see why the section before me is not equally so. I have, therefore, no course here but to decide these lines of rails were a railway within the meaning of s. 4 of the Act of 1888, and that these carriages, not being propelled "elsewhere than upon a railway," are not subject to carriage duty.

Judgment for the defendants.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitor for defendants: *Sydney Morse.*

J. F. C.

ATTORNEY-GENERAL *v.* SUTCLIFFE.

1907
July 19.

Alien—Undesirable—Stowaway—Expulsion Order—Expenses incidental to Deportation—Liability of Master of Ship bringing Alien to the United Kingdom—Aliens Act, 1905 (5 *Edw.* 7, *c.* 13), *s.* 4.

Where the Secretary of State makes an order for the expulsion of an alien under the Aliens Act, 1905, and pays the expenses incidental to the alien's deportation under s. 4, sub-s. 1, he may under sub-s. 2 recover the sums so paid by him from the master of the ship in which the alien was brought to the United Kingdom, notwithstanding that the alien had, by secreting himself on board the ship as a stowaway, caused himself to be brought here without the master's consent.

SPECIAL CASE STATED BY CONSENT.

On July 19, 1906, the steamship *Tongariro*, belonging to the New Zealand Shipping Company, Limited, whose London office is at 138, Leadenhall Street, arrived from New Zealand at the Victoria Dock in the port of London.

The said steamship was not an immigrant ship within the meaning of the Aliens Act, 1905.

At the date aforesaid the defendant was the master of the said ship.

The said ship in the course of her voyage touched at Teneriffe, and whilst there a certain alien named Martin Fromberger, a native of Germany, came aboard her without the knowledge of the defendant, and, having so come aboard, was carried in the said ship to the port of London.

The said Martin Fromberger was a stowaway within the meaning of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60). His presence on board the *Tongariro* was not discovered until July 13, 1906, after the steamship had left Teneriffe, which was her last port of call.

The said Martin Fromberger was given into custody, on the charge set out in the next paragraph, by the master of the *Tongariro* on her arrival in London and before being allowed to land, and was taken ashore by a constable.

On July 20, 1906, the said Martin Fromberger, at the instance of the defendant, was brought up before two justices of the peace at the West Ham Police Court and charged under s. 237 of the

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Merchant Shipping Act, 1894, with the offence of unlawfully secreting himself and going to sea on July 13, 1906, in the said ship without the consent of the owners thereof.

Martin Fromberger pleaded guilty to the said charge, and was sentenced to fourteen days' imprisonment.

The justices, being of opinion that Fromberger should be expelled from the United Kingdom on completion of the said term of imprisonment, forwarded to the Secretary of State a certificate whereby they certified that he had been convicted and sentenced as aforesaid, and recommended that an expulsion order should be made in addition to the said sentence.

In compliance with the above recommendation of the said justices, and purporting to act in conformity with the powers in that behalf conferred upon him by s. 3 of the Aliens Act, 1905, the Secretary of State on August 2, 1906, made an expulsion order requiring the said Martin Fromberger to leave the United Kingdom, and, in consequence of the said order, on August 4, 1906, Fromberger was conveyed on board a ship at St. Katharine's Dock and deported to Germany.

The Secretary of State, purporting to act within the powers in that behalf conferred upon him by s. 4, sub-s. 1, of the said Act (1), paid the sum of 1*l.* 2*s.* 7*d.* in respect of the expenses

(1) By s. 3, sub-s. 1, of the Aliens Act, 1905: "The Secretary of State may, if he thinks fit, make an order (in this Act referred to as an expulsion order) requiring an alien to leave the United Kingdom within a time fixed by the order, and thereafter to remain out of the United Kingdom—

"(*a*) If it is certified to him by any Court (including a Court of summary jurisdiction) that the alien has been convicted by that Court of any felony or misdemeanour or other offence for which the Court has power to impose imprisonment without the option of a fine . . . . and that the Court recommend that an expulsion order should be made in his case either in addition to or in lieu of his sentence."

By s. 4, sub-s. 1: "When an expulsion order is made in the case of any alien, the Secretary of State may, if he thinks fit, pay the whole or any part of the expenses of or incidental to the departure from the United Kingdom and maintenance until departure of the alien and his dependents (if any)."

Sub-s. 2: "If an expulsion order is made in the case of any alien . . . . on a certificate given within six months after he has last entered the United Kingdom, the master of the ship in which he has been brought to the United Kingdom, and also the master of any ship belonging to the same owner, shall be liable to pay to

incidental to the departure, and maintenance until departure, from the United Kingdom of the said Fromberger.

The Secretary of State has since applied to the defendant for repayment of the sum so paid by him as aforesaid as a debt due from the defendant to the Crown under s. 4, sub-s. 2, of the said Act, but the defendant refused to repay the same, upon the ground that under the circumstances hereinbefore appearing the provisions of the Aliens Act do not apply in his case.

Scrutton, K.C., and *Bailhache*, for the defendant. The Aliens Act, 1905, does not apply to the case of a stowaway. The words "in which he has been brought to the United Kingdom" mean "in which he has been brought with the knowledge and consent of the master." It cannot have been the intention to hold the master responsible for the act of a person over whom he had no control. The word "brought" implies a voluntary act of bringing. The hardship on the master would be very great, for there is nothing in the Act giving him a right to recover over against his owners. The Act only applies to alien immigrants, and by s. 8, sub-s. 1, "The expression 'immigrant' in this Act means an alien steerage passenger who is to be landed in the United Kingdom"; and by sub-s. 3 "The expression 'passenger' in this Act includes any person carried on the ship other than the master and persons employed in the working or service of the ship." But by the same section under which this man was convicted—s. 237 of the Merchant Shipping Act, 1894—"Every person who goes to sea in a ship without such consent as aforesaid shall, so long as he remains in the ship, be deemed to belong to the ship, and be subject to the same laws and regulations for preserving discipline, and to the same fines and punishments for offences constituting or tending to a breach of discipline, as if he were a member of, and had signed the agreement with, the crew." A stowaway therefore, not being

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the Secretary of State as a debt due to the Crown any sums paid by the Secretary of State under this section in connection with the alien."

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a passenger, is not an immigrant, and consequently is not within the operation of the Act.

Sir W. S. Robson, S.-G., and *T. C. Hedderwick*, for the Crown. The object of the Act was to keep out of this country all aliens who are unable to satisfy certain specified conditions, and the Legislature thought that the best means of attaining that end was to cast an absolute duty upon shipowners to prevent undesirable aliens from arriving in this country by any of their ships. It is not suggested that there is any blame attaching to the defendant here. The liability to pay the expenses of the deportation is to be regarded, not as in the nature of a penalty, but as a tax incident to the trade of shipowning. It was not intended that there should be a personal liability on the master of the ship in which the alien was brought, for the money may be claimed by the Secretary of State from "the master of any ship belonging to the same owners." That shews that the liability is on the owners, not on their servant. Moreover, s. 7, sub-s. 2, points in the same direction. It provides that s. 693 of the Merchant Shipping Act, 1894, "shall apply with respect to . . . . any sums of money to be paid under this Act by the master of a ship as it applies with respect to . . . . sums of money to be paid under that Act." And s. 693 of the Merchant Shipping Act, 1894, says that "Where any Court . . . . has power to make an order directing payment to be made of any . . . . sums of money, then, if the party so directed to pay is the master . . . . of a ship and the same is not paid . . . . the Court . . . . who made the order may . . . . direct the amount remaining unpaid to be levied by distress or poinding and sale of the ship, her tackle, furniture, and apparel." The supposed hardship of having to bear the expense of deportation of a stowaway is more apparent than substantial, for it is not disputed that if an alien passenger turned out to be undesirable after he had landed the master would have to pay the money although he had no reason to suspect that he was undesirable at the time that he accepted him as a passenger. With regard to the argument that s. 4 was only intended to apply to "immigrants" as defined in the Act, it is to be observed that the word "immigrant" does not occur in ss. 3 or 4. There is nothing to prevent

an expulsion order under certain circumstances being made against a person who was brought here as a cabin passenger, and similarly there is nothing to prevent its being made against a person who, like a stowaway, is not a passenger at all. If the Act is not to apply to stowaways its whole policy may be defeated.

Bailhache, in reply. The hardship in the present case is much greater than that in the case put of the master bringing a person whom he had no reason to suppose was undesirable, for there the master does exercise a choice as to whether he will bring the man or not and takes the risk of the man being subsequently deported, but in the case of a stowaway the master had no opportunity of exercising any choice at all. If the Legislature intended, as is alleged, to impose the liability upon the shipowners and not upon the master, they have failed to carry out that intention. For it is only optional with the Court which makes the order for payment of the money whether it will order the payment to be levied by distress of the ship. If the Court does not make such an order for distress, the master will have to pay the money out of his own pocket, and cannot recover it from his owners.

BRAY J. I think this case is reasonably clear. The Aliens Act, in s. 4, sub-s. 2, says that, "If an expulsion order is made in the case of any alien . . . . on a certificate given within six months after he has last entered the United Kingdom, the master of the ship in which he has been brought to the United Kingdom, and also the master of any ship belonging to the same owner, shall be liable to pay to the Secretary of State as a debt due to the Crown any sums paid by the Secretary of State under this section in connection with the alien." It seems to me that the policy of the Act was to hold the ship responsible if any undesirable alien came in her to this country. The money is made payable by the master, not by way of penalty for any wrongful act done by him, but as a means of enforcing the liability of the ship. But, further, I am bound to give the words of the section their ordinary signification, unless there is some plain reason for doing otherwise. The words to be construed are "the master of the ship in which

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he has been brought." Their meaning seems perfectly clear. The section means what it says. The Legislature were careful not to say "brought by the master" or by any one else. It is enough that the man was brought in the ship. Here the alien was brought to this country in the defendant's ship. The ship, therefore, must be made responsible, through the master, for the repayment of the expenses to which the Secretary of State has been put. I should like to say, with regard to s. 8, sub-s. 3, that I do not desire to put any interpretation upon it. It will be time enough to determine what that sub-section means when the question arises. But the words of the section before me are too clear to admit of any doubt. And I am not at liberty to read any words of qualification into it. There will be judgment for the Crown.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Customs.*
Solicitors for defendant: *Cattarns & Co.*

J. F. C.

END OF VOL. II.

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ADULTERATION—*Sale of Food and Drugs Act*, 1875, (38 & 39 *Vict. c.* 63), *s.* 25—*Milk—Written Warranty—Future Deliveries—Evidence in Writing to connect Particular Consignment with Warranty.*

By a contract in writing, the appellant agreed to purchase from a company "the whole of the milk required for his dairy" for twelve months from October 1, 1905, and the contract contained a warranty that all milk to be delivered by the company to the appellant should be pure. In June, 1906, milk was delivered to the appellant by the company under the contract accompanied by a delivery note, which shewed that the milk came from the company, but which did not in terms refer to the contract. Some of the milk was sold by the appellant, and was found upon analysis to have had 28 per cent. of milk fat abstracted from it. On an information against the appellant for having sold the milk contrary to the provisions of the Sale of Food and Drugs Act, 1875, the appellant relied on the warranty contained in the contract as a defence under s. 25 of the Act:—

Held that, as the warranty was by the contract expressly applied to all milk sold by the company to the appellant during the specified period, the contract itself was sufficient evidence in writing to connect the particular consignment of milk with the warranty, and that the requirements of s. 25 had been satisfied.

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ALIEN—*Undesirable—Stowaway—Expulsion Order—Expenses incidental to Deportation—Liability of Master of Ship bringing Alien to the United Kingdom—Aliens Act*, 1905 (5 *Edw. 7, c.* 13), *s.* 4.

Where the Secretary of State makes an order for the expulsion of an alien under the Aliens Act, 1905, and pays the expenses incidental to the alien's deportation under s. 4, sub-s. 1, he may under sub-s. 2 recover the sums so paid by him from the master of the ship in which the alien was brought to the United Kingdom, notwithstanding that the alien had, by secreting himself on board the ship as a stowaway, caused himself to be brought here without the master's consent. ATTORNEY-GENERAL *v.* SUTCLIFFE **Bray J. 997**

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AUCTIONEER—*Partnership—Bill of Exchange—Implied Authority to Accept—Trader.*

Decision of a Divisional Court, [1906] 2 K. B. 321, reversed. WHEATLEY *v.* SMITHERS **C. A. 684**

2. —— *Personal Liability—Sale subject to Reserve—Lot knocked down at less than Reserve.*

At a sale by auction subject to a reserve price on the article sold, where the fact that there is a reserve is known, the offer of the auctioneer to sell, the bidding, and the knocking down of the article to the highest bidder are all subject to the condition that the reserve price should be reached, and the fact that the auctioneer knocks down the article to a bidder who has bid a less price than the reserve gives the latter no right of action against the auctioneer, either for breach of duty in refusing to sign a memorandum of or otherwise complete the contract, or for breach of warranty of authority to accept the bid. MCMANUS *v.* FORTESCUE - **C. A. 1**

AUDITOR—Certiorari—Right of Court to review surcharge - - - - - - **878**
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AUTHOR—Publisher and—Sale of copyright to publisher on royalties—Bankruptcy of publisher—Trustee carrying on business - - - - - - - **33**
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BANKRUPTCY — *Author and Publisher — Sale of Copyright to Publisher on Royalties—Bankruptcy of Publisher — Continuing Contract — Trustee carrying on Business—Whether Royalties payable in Full.*

An author sold the copyright of his book to a publisher upon the terms that the publisher should print and publish it and should pay him certain royalties upon the sales of the book. The publisher became bankrupt, and the trustee in bankruptcy carried on the bankrupt's business until he sold it as a going concern with all copyrights. During the time the trustee carried on the business sales of the book were effected, and the trustee received the proceeds of these sales. The author claimed to be paid in full the royalties on these sales ;—

Held, that the transaction between the author and the publisher was analogous to that of a sale of goods at a price varying in amount and depending on certain events, and that the author was only entitled to prove in the bankruptcy for the damages sustained by breach of the contract. *In re* GRANT RICHARDS. *Ex parte* WARWICK DEEPING - - - - **Bigham J. 33**

2. —— *Conditional Order of Discharge — Non-fulfilment in part of Condition—Revocation of Order of Discharge — Jurisdiction — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 104—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-ss.* 2 (*iv.*), 8—*Bankruptcy Rules*, 1886—1890, *rr*, 240, 244A ; *Appendix*, *Form* 63A.

When the Court grants a bankrupt a conditional discharge under sub-s. 2 (iv.) of s. 8 of the Bankruptcy Act, 1890, in the terms of Form 63A in the Appendix to the Bankruptcy Rules, 1886—1890, the condition of the discharge is not merely his consenting to judgment being entered against him for the required amount, but his due performance of the judgment by payment of the instalments directed ; and if the bankrupt gives the usual consent to judgment but fails without sufficient cause to pay the instalments, the Court has jurisdiction under s. 104 of the Bankruptcy Act, 1883, to revoke the order of discharge. *In re* SUMMERS. *Ex parte* THE OFFICIAL RECEIVER **Bigham J. 166**

3. —— *Costs Part of Petitioning Creditors Debts—Petition Dismissed—Set-off of Costs—Practice.*

There can be no set-off of costs in bankruptcy proceedings between a creditor and his debtor where the creditor makes costs payable to him part of the debt on which he bases his bankruptcy petition against his debtor ; although, if

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such costs had not been made part of the petitioning creditor's debt, a set-off of costs would have been allowed. Costs payable by a debtor on failing to set aside a bankruptcy notice, and costs payable by the creditor on the dismissal with costs of his bankruptcy petition based on such notice, may be set off. *In re* A Debtor. *Ex parte* Petitioning Creditors
Bigham J. 896

4. —— *Deed of Arrangement—Non-registration—Validity—Assignment for the Benefit of certain named Creditors only—Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *s.* 4, *sub-s.* 2; *s.* 19.

An assignment by a debtor for the benefit of certain named creditors only without any option to the remaining creditors to assent to the deed is not a deed of arrangement for the benefit of the creditors generally within the Deeds of Arrangement Act, 1887, and consequently does not require registration.

Dictum of Vaughan Williams L.J. in *Hedges* v. *Preston*, (1899) 80 L. T. 847, explained and distinguished. *In re* Saumarez. *Ex parte* Salaman - - - - - - **C. A. 170**

5. —— *Practice—Moneys improperly retained by Trustee—Penal Interest—Whether payable to Bankrupt's Estate or to the Treasury—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *c.* 74, *sub-ss.* 3, 6; *s.* 76.

The penal interest of 20 per cent. chargeable against a trustee in bankruptcy under s. 74, sub-s. 6, of the Bankruptcy Act, 1883, for improperly retaining moneys belonging to the estate is payable to the bankrupt's estate, and not to the Treasury. *In re* Sims. *Ex parte* The Official Receiver - - **Bigham J. 36**

6. —— *Proof—Goods in Order and Disposition of Bankrupt—Right of Proof by true Owner for Value of Goods—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-ss.* 3, 8; *s.* 44, *sub-s.* 2 (*iii.*).

At the date of the bankruptcy of the debtor, an art dealer, there were in his possession goods which had been entrusted to him by a customer to sell for the customer at the best prices he could get for them, and by an order made in the bankruptcy it was adjudged that these goods passed to the trustee as being in the order and disposition of the bankrupt within the reputed ownership clause, s. 44, sub-s. 2 (iii.), of the Bankruptcy Act, 1883:—

Held, that the customer was entitled to prove in the bankruptcy for the value of the goods.

Decision of Bigham J., [1907] 1 K. B. 397, reversed. *In re* Button. *Ex parte* Haviside
C. A. 180

7. —— *Proof by Assignee of Creditor—Costs due by Creditor to Trustee—Dividend on Proof—Trustee's Right to retain Dividend against Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 58.

A creditor assigned for value all her claims against a bankrupt and her assignees lodged a proof against the bankrupt's estate, which was admitted. A dividend became payable in respect of the proof:—

Held, that the trustee was entitled to retain

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the dividend against taxed costs which the creditor had been ordered to pay to him. *In re* Mayne. *Ex parte* The Official Receiver
Bigham J. 899

8. —— *Proof of Debt by Money-lender—Withdrawal of Proof—Money-lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 1, *sub-s.* 3—*Jurisdiction of Bankruptcy Court to grant Relief under.*

A bankrupt was indebted to a money-lender for money lent, the money-lender holding a security for the debt. The creditor lodged a proof in the bankruptcy for the debt stating the amount at which he valued the security. The proof was not made use of in voting at any meeting of creditors. The trustee having required the creditor to give up the security under Sched. I., r. 12, of the Bankruptcy Act, 1883, he gave notice of withdrawal of the proof and of intention to correct the valuation by a new proof. The trustee then moved the bankruptcy Court for an order for an account, and for relief under the Money-lenders Act, 1900.

Held, that the jurisdiction of the bankruptcy Court to exercise the powers of the Money-lenders Act arises only under s. 1, sub-s. 3, of that Act, and is confined to cases in which there is an application before the Court relating to the admission or amount of a proof by a money-lender; that, as the proof had not been used either for purposes of voting or of claiming a dividend, the creditor was at liberty to withdraw it without the consent either of the trustee or of the Court; and that, as there was consequently no proof by the money-lender before the Court, it had no jurisdiction to entertain the motion. *In re* Attree. *Ex parte* Ward
Div. Ct. 868

9. —— *Solicitor and Client—Cash Accounts—Draft Bills of Costs—Contentious Business—Delivery of detailed Bills waived—Stated and agreed Accounts—Mortgage to secure agreed Balance—Proof by Solicitor—Trustee's Right to go behind Mortgage and settled Account—Right to require Particulars and Vouchers—Judgment recovered—Bankruptcy Act*, 1843 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 22.

No judgment recovered against the bankrupt, no covenant for payment given by or account stated with him, can deprive the trustee in bankruptcy of his right and duty to investigate the nature and grounds of the claim made against the bankrupt's estate: the trustee is therefore entitled to go behind these forms and to require satisfactory evidence that the debt on which the proof is founded is a real debt.

Decision of Bigham J., [1907] 1 K. B. 155 (by mistake there called *Ex parte Pattullo*), affirmed.

In re Van Laun. *Ex parte* Chatterton
C. A. 23

—— Judgment debtor—Execution under writ of fi. fa.—Absence of overt act by sheriff of seizure of money - - - **437**
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BANKRUPTCY RULES, 1886—1890, rr. 240, 244a; APPENDIX, Form 63a - 166
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BELGIUM—Extradition treaty between United Kingdom and Belgium of October 29, 1901, arts. 9, 11—Belgian Penal Code, arts. 92, 96 - - - - - **157**
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BENEFICE—Income tax—Incumbent of benefice—Easter offerings - - - **688**
See REVENUE. 4.

BILL OF EXCHANGE—*Indorsement by way of Security—Circuity of Action—Bill not complete and regular on Face of it.*

The defendant entered into an agreement with the plaintiff that if the plaintiff would sell some pigs to T. the defendant would guarantee the payment of the price, and for that purpose would indorse bills accepted by T. for the amount. In pursuance of that agreement, T. wrote his acceptances across the face of two blank stamped bill forms, and the defendant indorsed them. T. then handed the bill forms to the plaintiff, who filled up the body of the bills for the agreed amount, making them payable to his order, signed them as drawer, and also indorsed them. The plaintiff duly delivered the pigs to T. In an action against the defendant on the bills :—

Held, (1.) that, having regard to the agreement between the parties, the bills must be treated as though they had been indorsed by the plaintiff to the defendant without consideration, and then reindorsed by the defendant to the plaintiff in consideration of the delivery of the pigs, and that under those circumstances the defendant was, upon the authority of *Wilkinson* v. *Unwin*, (1881) 7 Q. B. D. 636, precluded from setting up the defence that the plaintiff was himself a previous indorser ; and (2.) that by reason of the agreement the defendant was also precluded from setting up the defence that at the time the defendant indorsed the bills they were not complete and regular upon the face of them.

Jenkins v. *Coomber*, [1898] 2 Q. B. 168, distinguished. GLENIE *v.* BRUCE SMITH
A. T. Lawrence J. 507

—— Auctioneer—Partnership—Implied authority to accept—Trader - - - **684**
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BLANK—Promissory note—Signature in blank—Fraudulent negotiation of note by agent—Rights of bona fide indorsee for value - - - - - - **735**
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BRADFORD IMPROVEMENT—Power to order substitution of water-closets for existing privies - - - - - - **385**
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—— London—Party wall—Compensation for damage to trade—Jurisdiction of surveyors - - - - - **822**
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—— London—"Structure"—Erection beyond general line of buildings—Show-case of wood and glass - - - - **45**
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CABLE—Fouling cable by anchor—Sacrifice of anchor—Compensation - - **305**
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CANAL—Railway and canal traffic.
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CAPTURE—Warranty of freedom from capture—Capture of ship—Condemnation—Relation back of title of capture - **248**
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CARRIAGE—Railway company—Contract of carriage—Special contract not in writing—Liability for loss - - **222**
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CARRIAGE LICENCE—Cars on light railway
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CARRIER—*Railway Company—Passenger's Luggage carried free of Charge—Articles over Value of* 10*l.*—*Liability for Loss—Carriers Act*, 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 68), *ss.* 1, 2.

The provisions of the Carriers Act, 1830, apply to ordinary personal luggage of a passenger which by the regulations of the railway companies he is entitled to have carried free of charge. CASSWELL *v.* CHESHIRE LINES COMMITTEE
Div. Ct. 499

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CASES :—

—— *Adams* v. *Marylebone Borough Council*, [1906] 2 K. B. 767.
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—— *Bailey* v. *Bailey*, (1884) 13 Q. B. D. 855
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—— *Bartell* v. *Gray & Co.*, [1902] 1 K. B. 225
Head-note in, corrected by C. A. HARRISON *v.* OCEANIC STEAM NAVIGATION CO. - **[1907] 2 K. B. 420**

—— *Branckelow Steamship Co.* v. *Lamport & Holt*, [1907] 1 K. B. 787.
Approved of by C. A. NELSON & SONS, LD. *v.* NELSON LINE, LIVERPOOL, LD. *In re* THE SAME **[1907] 2 K. B. 705**

—— *Button, In re. Ex parte Haviside*, [1907] 1 K. B. 397.
Reversed by C. A. - **[1907] 2 K. B. 180**

—— *Castellain* v. *Preston*, (1883) 11 Q. B. D. 380.
Principles laid down by Brett L.J. and Bowen L.J. in, applied by Pickford J. in ASSICURAZIONI GENERALI DE TRIESTE *v.* EMPRESS ASSURANCE CORPORATION, LD. - **[1907] 2 K. B. 814**

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—— *Chorley Corporation* v. *Nightingale*, [1906] 2 K. B. 612.
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—— *Clare* v. *Joseph* - - [1906] 2 K. B. 592
Reversed by C. A. - **[1907] 2 K. B. 369**

—— *Cooper* v. *Blakiston* - [1907] 1 K. B. 336
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—— *Cribb* v. *Kynoch, Ld.* - [1907] 2 K. B. 548
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[1907] 2 K. B. 646

—— *Doe* d. *Wyatt* v. *Byron*, (1845) 1 C. B. 623
Dictum of Erle J. at p. 634. Applied by C. A. MOORE *v.* SMEE AND CORNISH - - - **[1907] 2 K. B. 8.**

—— *Douglas* v. *Smith* - - [1907] 1 K. B. 126
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—— *Glendevon, The* - - - [1893] P. 269
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—— *Green* v. *Britten & Gilson*, [1904] 1 K. B. 350.
Explained by C. A. MORETON *v.* REEVE
[1907] 2 K. B. 401

—— *Hatch, Mansfield & Co.* v. *Weingott*, (1906) 22 Times L. R. 366.
Followed by Pickford J. ASSICURAZIONI GENERALI DE TRIESTE *v.* EMPRESS ASSURANCE CORPORATION, LD. - - - **[1907] 2 K. B. 814**

—— *Hedges* v. *Preston* - (1899) 80 L. T. 847
Dictum of Vaughan Williams L.J. in, explained and distinguished by C. A. *In re* SAUMAREZ - **[1907] 2 K. B. 170**

—— *Jenkins* v. *Coomber* - [1898] 2 Q. B. 168
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[1907] 2 K. B. 507

—— *Jennings* v. *Johnson*, (1873) L. R. 8 C. P. 425.
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—— *Lancashire and Cheshire Coal Association* v. *London and North Western Railway Co. and Lancashire and Yorkshire Railway Co.*, [1906] 1 K. B. 577.
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[1907] 2 K. B. 902

—— *Lloyd's Bank, Ld.* v. *Cooke*, [1907] 1 K. B. 794.
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—— *Nelson & Sons, Ld.* v. *Nelson Line, Liverpool, Ld.*, [1907] 1 K. B. 788.
Affirmed by C. A. - **[1907] 2 K B 705**

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—— *Newport Union* v. *Stead. Newport Union* v. *Green*, [1906] 2 K. B. 147.
Affirmed by C. A. - **[1907] 2 K. B. 460**

—— *Nicholson* v. *Booth*, (1888) 16 Cox, C. C. 373; 57 L. J. (M.C.) 43.
Distinguished by Div. Ct. PICKERING *v.* WILLOUGHBY - **[1907] 2 K. B. 296**

—— *Oppenheimer* v. *Frazer & Wyatt*, [1907] 1 K. B. 519.
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—— *Pilcher, In re. Pilcher* v. *Hinds*, (1879) 11 Ch. D. 905.
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—— *Reg.* v. *Vange* - - (1842) 3 Q. B. 242
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—— *Rex* v. *Middlesex Justices. Ex parte Walsall Union*, [1906] 2 K. B. 365.
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—— *Sion College* v. *London Corporation*, [1901] 1 K. B. 617.
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—— *Smurthwaite* v. *Hannay* [1894] A. C. 494
Considered by C. A. LLOYD *v.* GREAT WESTERN DAIRIES CO.
[1907] 2 K. B. 727

—— *Thompson* v. *F. & W. Sinclair*, [1906] 2 K. B. 275.
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C. A. [1907] 2 K. B. 420

—— *Van Laun, In re. Ex parte Pattullo*, [1907] 1 K. B. 155.
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—— *Villar* v. *Gilbey* - [1907] A. C. 139
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—— *Wakefield and District Light Railways Co.* v. *Wakefield Corporation*, [1906] 2 K. B. 140.
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—— *Watts* v. *Stevens* - [1906] 2 K. B. 323
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—— *Westminster Corporation* v. *Gordon Hotels, Ld.*, [1907] 1 K. B. 910.
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—— *Wheatley* v. *Smithers* - [1906] 2 K. B. 321
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—— *Wilkinson* v. *Lancashire and Yorkshire Railway Co.*, [1906] 2 K. B. 619.
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—— *Wilkinson* v. *Unwin*, (1881) 7 Q. B. D. 636
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COMPENSATION—*Loss of Office*—"*Office*"—"*Place, Situation, or Employment*"—*Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 100, 120.

A local Act, by which a poor law union and a rural district were dissolved, provided that any officer of the guardians or rural district who should be in office at the commencement of the Act, and who by virtue thereof should suffer direct pecuniary loss, should be deemed to be an officer entitled to compensation within the meaning of s. 120 of the Local Government Act, 1888, and that that section should apply accordingly. By s. 100 of that Act the expression "office" includes "any place, situation, or employment," and the expression "officer" is to be construed accordingly.

A firm of solicitors were during a period of about twenty-six years next before the commencement of the Act from time to time employed by the board of guardians of the union and the rural district council to do such legal work as those bodies required to have done, receiving by way of remuneration for that work the usual professional costs and charges payable to solicitors for such work; and during that period no other solicitor was employed by the board of guardians or council:—

Held, that the solicitors so employed could not be considered as officers of or as holding any "place, situation or employment" under the board of guardians or rural district council within the meaning of ss. 100, 120 of the Local Government Act, 1888. CARPENTER *v.* BRISTOL CORPORATION - - - - - C. A. 617

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COPYRIGHT—Author and publisher—Sale of copyright to publisher on royalties—Bankruptcy of publisher — Trustee carrying on business - - - 33
See BANKRUPTCY. 1.

COSTS—Bankruptcy—Practice—Costs part of petitioning creditors' debts—Petition dismissed—Set-off of costs - - **896**
See BANKRUPTCY. 3.

—— Bankruptcy—Practice—Proof by assignee of creditor—Costs due by creditor to trustee—Dividend on proof—Trustee's right to retain dividend against costs
See BANKRUPTCY. 7. **899**

—— Security for costs—Appeal to King's Bench Division from official referee—Inherent jurisdiction of High Court - - **106**
See PRACTICE. 1.

—— Solicitor and client—Agreement as to costs - - - - - - **369**
See SOLICITOR. 1.

—— Solicitor and client costs — Insurance, Marine—Open cover slip—Damages—Fraudulent representations — Reinsurance—Subrogation - - - **814**
See INSURANCE, MARINE. 1.

COUNTY COUNCIL—Schools—Provision of new hot-water apparatus and earth-closets—Charge on parish served by school **756**
See SCHOOLS. 2.

COUNTY COURT—*Practice—Writ of Execution—Time of Application for Writ—Where Registrar of County Court is also High Bailiff—Delivery of Writ to Officer charged with Enforcement—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 26.

Sect. 26 of the Sale of Goods Act, 1893, as applied to execution in county courts, must be construed as providing that the time from which a writ of execution, in a county court where the registrar is also high bailiff, binds the property in the goods of the execution debtor is the time at which application is made for the writ, and not the time at which the writ is delivered to the officer charged with the enforcement of it.

Quære whether the same rule does not apply in a county court where the registrar is not also high bailiff. MURGATROYD *v.* WRIGHT. BANNISTER, Claimant - - - **Div. Ct. 333**

—— Devastavit—Statute of Limitations—Claim on guarantee - - - - - **350**
See EXECUTOR.

—— Interpleader—Execution—Goods belonging neither to the execution debtor nor to the claimant—Money paid into Court, who entitled to - - - - - **845**
See INTERPLEADER.

COUNTY COURT RULES, 1903, Order XXX., rr. 3, 4; Form 238 - - - **350**
See EXECUTOR.

COVENANT—Lease—Covenant not to assign without consent—Payment for leave to assign - - - - - - **494**
See LANDLORD AND TENANT. 1.

CREDITORS—Bankruptcy.
See under BANKRUPTCY.

CRIMINAL LAW—*Riot—Intention to render mutual Help against Opposition—Force and Violence—Persons riotously and tumultuously assembled—Building injured or destroyed—Riot (Damages) Act*, 1886 (49 & 50 *Vict. c.* 38), *s.* 2.

In order to constitute a riot five elements are necessary—(1.) a number of persons not less than three; (2.) a common purpose; (3.) execution or inception of the common purpose; (4.) an intent on the part of the number of persons to help one another, by force if necessary, against any person who may oppose them in the execution of the common purpose; (5.) force or violence, not merely used in and about the common purpose, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.

In an action under s. 2 of the Riot (Damages) Act, 1886, to recover compensation for the injury or destruction of a building by persons riotously and tumultuously assembled together, the following facts were proved:—At nine o'clock on a night at the end of October a number of youths of ages varying from fourteen to eighteen years were congregated together upon the foot-pavement of a road in a low neighbourhood shouting and using rough language. The pavement adjoined a nine-inch wall of considerable length inclosing a yard and let into a house. Some of the youths were standing with their backs against the wall and others were running against them, or against the wall, with their hands extended. After they had gone backwards and forwards in this way for about fifteen minutes, the wall, to the extent of about twelve feet, fell. As soon as it fell the caretaker of the premises came out into the street, and the youths then dispersed in different directions:—

Held, that there was no evidence of any intention on the part of the youths to help one another by force if necessary against any person who might oppose them in the execution of their common purpose of injuring or destroying the wall; or of any force or violence (other than the force or violence used in the actual demolishing of the wall) displayed in such a manner as to alarm any person of reasonable firmness and courage; and therefore that the youths were not riotously and tumultuously assembled together within the meaning of s. 2 of the Riot (Damages) Act, 1886.

Semble, in order to sustain a claim under that section it is necessary to prove all the elements of a riot. FIELD *v.* RECEIVER OF METROPOLITAN POLICE - - - - **Div. Ct. 853**

2. —— *Summary Jurisdiction—"Complaint by or on behalf of Party aggrieved"—Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *s.* 42.

By s. 42 of the Offences against the Person Act, 1861, where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence.

An assault having been committed upon a person who was so old and infirm, and so much under the control of the assailant, as to be unable to institute or authorize proceedings, an information was laid by a relative of the person assaulted in respect of the assault. Two justices

CRIMINAL LAW—*continued.*

of the peace heard the matter and convicted the offender:—

Held, that the matter had been duly brought before the justices, upon complaint on behalf of the party aggrieved, within the meaning of the above section, and that they had jurisdiction to hear and determine it.

Nicholson v. *Booth*, (1888) 16 Cox, C. C. 373; 57 L. J. (M. C.) 43, distinguished. PICKERING *v.* WILLOUGHBY - - - - **Div. Ct. 296**

—— Extradition—Treaty between Great Britain and Germany for the mutual surrender of fugitive criminals of May 14, 1872, arts. 4, 5 - - - - - - **861**
See EXTRADITION. 2.

—— Larceny by a trick—Mercantile agent—Possession of goods—Consent of owner
See FACTOR. **50**

CUSTOMS AND INLAND REVENUE.
See under REVENUE.

DAMAGE AND DAMAGES—Fouling of cable by anchor—Sacrifice of anchor—Compensation—Measure of damages - **305**
See TELEGRAPH.

—— Fowls straying on highway—Damage to passenger — Liability of owner — Remoteness - - - - - - **345**
See TRESPASS.

—— Insurance, Marine — Open cover slip — Fraudulent representations — Reinsurance—Subrogation - - - **814**
See INSURANCE, MARINE. 1.

—— Riot—Persons riotously and tumultuously assembled — Building injured or destroyed—Damages - - - **853**
See CRIMINAL LAW. 1.

—— Railway—Demurrage of trucks—Right of action for damages for detention — Jurisdiction - - - - - **664**
See RAILWAY. 4.

"DANGEROUS"—Dog—Not kept under control—Evidence—Attacks on sheep **88**
See DOG.

DEDICATION—Ditch alongside of highway—Whether part of highway—Extent of dedication - - - - - - **637**
See HIGHWAY. 1.

DEED OF ARRANGEMENT — Non-registration —Validity - - - - - - **170**
See BANKRUPTCY. 4.

DEFAMATION—Libel—Interrogatory—Defence —Fair comment—Express malice **626**
See DISCOVERY.

DEMURRAGE—Trucks—Right of action for damages for detention—Jurisdiction
See RAILWAY. 4. **664**

DEPENDANTS—Workmen's compensation **422, 425, 563**
See EMPLOYER AND WORKMAN. 2—4.

DEVASTAVIT—Statute of Limitations—Claim on guarantee—Trustee - - **350**
See EXECUTOR.

DISCHARGE—Bankruptcy—Conditional order of discharge—Revocation of order
See BANKRUPTCY. 2. **166**

—— Criminal—Exemption from punishment acquired by lapse of time - - **861**
See EXTRADITION. 2.

DISCOVERY—*Interrogatory*—*Libel—Defence—Fair Comment—Express Malice—Practice.*

The plaintiffs, who were traders, sued the defendants for libel in respect of articles published in the defendants' newspapers relating to the manner in which the plaintiffs were alleged to be carrying on their business. The defendants pleaded justification and fair comment, and the plaintiffs joined issue. The defendants administered to the plaintiffs the following interrogatory: "Do you intend to set up that the defendants, in publishing the words complained of, were actuated by express malice towards the plaintiffs? If yea, state generally the facts and circumstances on which the plaintiffs rely as shewing actual malice":—

Held, that the interrogatory was inadmissible. LEVER BROTHERS *v.* ASSOCIATED NEWSPAPERS **C. A. 626**

—— Interrogatories—Admissibility—Action for seduction—Disclosure of names - **18**
See PRACTICE. 2.

DITCH—Highway, Ditch alongside of—Whether part of highway—Extent of dedication
See HIGHWAY. 1. **637**

DIVORCE—Judicial separation—Permanent alimony—Order of Probate and Divorce Division—Arrears—Action to recover
See HUSBAND AND WIFE. **13**

"DOCK"—Workmen's Compensation Act—Ship moored alongside a quay—"Undertakers" - - - - - - **420**
See EMPLOYER AND WORKMAN. 6.

DOG—*Not kept under Control*—"*Dangerous*" *Evidence—Attacks on Sheep—Dogs Act*, 1871 (34 & 35 *Vict. c.* 56), *s.* 2.

The fact that a dog has attacked and killed sheep is evidence that it is "dangerous" within s. 2 of the Dogs Act 1871. WILLIAMS *v.* RICHARDS - - - **Div. Ct. 88**

DRAINS.
See under SEWERS.

DUTY—Public revenue.
See under REVENUE.

EASTER OFFERINGS—Income tax—Incumbent of benefice - - - - - - **688**
See REVENUE. 4.

ECCLESIASTICAL LAW—Income tax—Incumbent of benefice—Easter offerings **688**
See REVENUE. 4.

EDUCATION.
See under SCHOOLS.

ELECTION PETITION—*Ballot Papers—Position of Voter's Marks on Paper—Sufficiency of—Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *Sched. II.*

A ballot paper is not rendered void under the Ballot Act, 1872, by reason of the voter placing his mark outside the ruled compartments on the paper, within which compartments it is intended

ELECTION PETITION—*continued.*

that the voter's mark shall be placed, if the mark is in such a position opposite to the name of a candidate as to leave no doubt for whom the voter intended to vote. PONTARDAWE RURAL DISTRICT COUNCIL ELECTION PETITION
Div. Ct. 313

ELEMENTARY EDUCATION.
See under SCHOOLS.

EMPLOYER AND WORKMAN—*Compensation—Agreement out of Court—Weekly Payments—Return of Workman to Work—Abandonment of Right to further Compensation—Death resulting from Accident—Claim by Dependants—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 1 (*a*) (*i.*).

A workman who was injured by an accident arising out of and in the course of his employment within the Workmen's Compensation Act, 1897, made an arrangement with his employer out of Court whereby he received for a certain time after the accident a weekly payment, and then, believing himself to have recovered, returned to work, nothing being said on either side as to the continuance or cessation of the compensation, and he subsequently died from the effects of the accident:—

Held, (1.) that these facts afforded no evidence that the workman had abandoned his right against the employer to further compensation; (2.) that, assuming that the workman had abandoned his right, his dependants had a separate right to compensation of which the workman could not deprive them, subject to this, that the employer was not bound to pay in the aggregate more than the maximum compensation allowed by the Act, and was entitled to take credit for the sums advanced to the workman by way of weekly payment. WILLIAMS *v.* VAUXHALL COLLIERY CO. **C. A. 433**

2. —— *Compensation — Dependants — Total or partial Dependency—Maintenance of Family by Workman — Workman's Earnings supplemented by Children's Wages—Claim of Widow —Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., clause* 1 (*a*) (*i.*), (*ii.*).

The widow and young children of a workman are none the less "dependants wholly dependent on his earnings at the time of his death" within the meaning of the Workmen's Compensation Act, 1897, because the workman has been enabled through the receipt by him, or through his wife as his agent, of moneys from wage-earning children or of moneys coming to him through other channels to augment the fund out of which he has maintained his family. SENIOR *v.* FOUNTAINS & BURNLEY, LD.
C. A. 563

3. —— *Compensation—Dependency on Workman's Earnings at Time of Death—Widow—Posthumous Child—Accidental Death of Workman—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

A workman was married to his wife in 1903, and for about nine months they lived with her parents. They then lived in apartments for three months, and afterwards with the husband's parents for about six weeks. The wife subsequently returned to her own parents, her husband having left her to seek work, and being ultimately employed as a miner in an adjoining village, where she occasionally went to see him. She last saw him in December, 1905, and in April, 1906, he was killed while working for the defendant company. A posthumous child, of which the deceased was the father, was born in September, 1906. The husband had not contributed to the wife's support since 1904, and in January, 1906, she went into domestic service, where she was earning 12*l.* a year at the time of the death.

In these circumstances, upon a claim by the widow and child for compensation under the Workmen's Compensation Act, 1907, the county court judge held that neither the wife nor the child was dependent on his earnings:—

Held, on appeal, that the county court judge had overlooked the legal presumption of dependency in the case of the wife, and had considered that the fact that the wife was receiving nothing from her husband at the time of his death was conclusive. His decision was wrong, and there was a total dependency of the wife.

Held, further, applying the rule in *Villar* v. *Gilbey*, [1907] A. C. 139, that the posthumous child was also a dependant. WILLIAMS *v.* OCEAN COAL CO. - - - - **C. A. 422**

4. —— *Compensation—Dependency on Workman's Earnings at time of death—Widow.*

Not reported, but a judgment from notes of counsel was read to the Court. The facts in this case were as follows: The applicant was married to the deceased on September 6, 1885. There were eight children of the marriage, three being alive at the date of the death. In March, 1904, the deceased left the applicant to look for work. Previously to that they had lived at Middlesbrough for seventeen years. The applicant never heard from the deceased after March, 1904, and did not know where he was. She thought he would come back as he had done once before after an absence of nine weeks. He was killed while in the employ of the respondents in 1906. After her husband left her the applicant maintained herself and her children for some weeks, and then went into the workhouse with them for three months. She afterwards lived with her mother and earned small sums by taking in washing and going out charing.

The county court judge held that the applicant was not dependent on the deceased at the time of his death. On appeal from that decision the Court of Appeal held that there was a presumption of dependency of the wife upon the husband which had not been rebutted. They therefore reversed the decision of the county court judge. STANLAND *v.* NORTH EASTERN STEEL CO. - **C. A.** [1907] **2 K. B. 425 n.**

—— Compensation — Infant — Duty to instruct.
See NOS. 8, 9, BELOW.

5. —— *Compensation—Ship moored alongside a Quay—"Undertakers"—"Actual Use and Occupation"—"Engineering Work"—Driller and Fitter—Employment "in, on, or about a Factory"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 7, *sub-ss.* 1, 2—

EMPLOYER AND WORKMAN—*continued.*

Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 104.

The mere juxtaposition of a ship to a quay is not of itself sufficient to make the person who meets with an accident in the ship a person employed on, in, or about a factory, and he will not be entitled to compensation unless the operations going on in the ship involve such a use of the quay as will bring in the provisions of s. 104 of the Factory and Workshop Act, 1901.

An "engineering work" must not only have reference to the locality, but also to the nature of the work which is being done at the time of the accident. HANDFORD *v.* GEORGE CLARK & CO. - - - - - - - **C. A. 409**

6. —— *Compensation—Ship moored alongside a Quay—"Undertakers"—Employment "in, on, or about a Factory"—"Actual Use and Occupation"—"Dock."*

In order that a workman may entitle himself to compensation under the Workmen's Compensation Act, 1897, he must shew that he has been employed "on, in, or about" a factory in respect of which his employer is "the undertaker." Unless he can fulfil those conditions he does not come within the remedy provided by the Act.

Head-note to the case of *Bartell* v. *Gray & Co.*, [1902] 1 K. B. 225, corrected. *Thompson* v. *F. & W. Sinclair*, [1906] 2 K. B. 275, indistinguishable. HARRISON *v.* OCEANIC STEAM NAVIGATION CO. (December 18, 1906) **C. A. [1907] 2 K. B. 420**

7. —— *Compensation — Warehouse — Retail Business—Injury to Workman—Factory—Workmen's Compensation Act*, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7, *sub-s.* 2.

There is no absolute rule of law that a store attached to a retail business cannot be a warehouse within s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897.

Green v. *Britten & Gilson*, [1904] 1 K. B. 350, explained. *Moreton* v. *Reeve* - **C. A. 401**

8. —— *Infant—Duty to Instruct—Delegation of Duty—Foreman—Negligence—Common Employment—Liability of Master—Dangerous Employment.*

The plaintiff, a girl fifteen years old, was employed in the defendants' cartridge factory in the work of testing the gauge of loaded cartridges. She worked under a forewoman, whose duty it was to give her proper instructions and warning as to the dangerous nature of the work, and in consequence of the forewoman's negligent failure to do so the plaintiff caused the cartridge to explode, thereby sustaining personal injuries, in respect of which she sued the defendants:—

Held, that the doctrine of common employment applied and the defendants were not liable, because, although there is a duty on an employer to give instructions to a young or inexperienced person employed by him in dangerous work, that duty is one which may be delegated by him to a foreman, and the negligence of the foreman is a risk which a fellow-servant, even though an infant takes upon himself. CRIBB *v.* KYNOCH, LD. - - - - - **Div. Ct. 548**

EMPLOYER AND WORKMAN—*continued.*

9. —— *Infant Workman—Duty of Employer to instruct—Delegation to Foreman—Negligence of Foreman—Common Employment—Dangerous Machinery.*

Where a master employs an inexperienced workman upon dangerous work it is his duty to instruct and caution him; but the master may delegate that duty to a competent person, and, if he does so, he will not be liable for an injury to the workman resulting from the negligence of the delegate in not properly instructing or cautioning him. There is no difference in this respect between an adult and an infant workman. Consequently, in an action for negligence against an employer by an infant who has been injured owing to the negligence of the employer's foreman in not fully instructing or cautioning him, it is open to the employer to raise the defence of common employment.

The decision in *Cribb* v. *Kynoch, Ld.*, [1907] 2 K. B. 548, approved. YOUNG *v.* HOFFMANN MANUFACTURING CO. - - - **C. A. 646**

—— Factory.
See also under FACTORY.

—— Factory—"In, on, or about a factory.
See NOS. 5, 6, ABOVE.

"ENGINEERING WORK"—Workmen's compensation - - - - - - **940**
See EMPLOYER AND WORKMAN. 5.

ESTATE DUTY.
See under REVENUE.

ESTATE TAIL — Actual tenant in tail — Restraint on barring entail—Estate duty
See REVENUE. 3. **940**

EVIDENCE — Dog — "Dangerous" — Not kept under control—Attacks on sheep - **88**
See DOG.

—— Licensing Acts—Report of licensing justices—Matters not stated in report
See LICENSING ACTS. 4. **340**

EXECUTION—Bankruptcy of judgment debtor —Execution under writ of fi. fa.—Absence of overt act by sheriff of seizure of money - - - - **437**
See SHERIFF. 1.

—— Building agreement—Plant on premises—Lien of building owner—Seizure by sheriff—Priority - - - - **522**
See SHERIFF. 2.

—— County court—Goods belonging neither to the execution debtor nor to the claimant —Money paid into Court, who entitled to - - - - - - - **845**
See INTERPLEADER.

—— County courts—Writ of execution—Time of application for writ—Sale of goods
See COUNTY COURT. **333**

EXECUTOR — *Devastavit—Statute of Limitations—Claim on Guarantee—Trustee Act*, 1888 (51 *&* 52 *Vict. c.* 59), *s.* 8, *ss.* 1 (*b*)—*County Court Rules*, 1903, *Order* XXX., *rr.* 3, 4; *Form* 238.

In an action commenced in the High Court in 1905, and transferred to the county court, against one of two executors of a testator, who

EXECUTOR—*continued.*
died in 1897, in respect of claims accruing due in 1903 and 1904 upon a guarantee given by the testator, the plaintiffs alleged a devastavit to have been committed by the defendant, in wrongfully handing over assets of the testator to a beneficiary under the will in 1898, more than six years before the commencement of the action, without making any provision for future liability under the guarantee. The county court judge having given judgment for the plaintiffs, adjudging that the defendant had committed a devastavit, and ordered execution against the defendant de bonis propriis :—

Held (reversing the judgment of Kennedy and A. T. Lawrence JJ.), that the claim in respect of the devastavit was barred by the Statute of Limitations, and therefore the order for execution de bonis propriis was wrong.

Quære whether the Trustee Act, 1888, s. 8, sub-s. 1 (*b*), applies to such a case. LACONS *v.* WARMOLL - - - - - - **C. A. 350**

EXPULSION ORDER — Undesirable alien — Stowaway—Liability of master of ship bringing alien to the United Kingdom *See* ALIEN. **997**

EXTRADITION—*Crime committed in Belgium —Prescriptive Period for Punishment—Order of Committal to await Surrender made within prescriptive Period, but during Time Prisoner serving Sentence for Crime committed in England —Arrest under Order of Committal after Expiration of prescriptive Period—Extradition Act,* 1870 (33 *&* 34 *Vict. c.* 52), *s.* 3, *sub-s.* 3; *ss.* 10, 11—*Extradition Treaty between United Kingdom and Belgium of October* 29, 1901, *arts.* 9, 11—*Belgian Penal Code, arts.* 92, 96.

Where a metropolitan magistrate commits a fugitive criminal, alleged to have been convicted in a foreign country of an extradition crime, to prison there to await the warrant of a Secretary of State for his surrender under s. 10 of the Extradition Act, 1870, and by virtue of s. 3, sub-s. 3, of the Act the prisoner's surrender cannot take place till after the expiration of a sentence inflicted on him in England for an offence committed in England, the order of committal will, if made before exemption from punishment for the extradition crime takes place in the foreign country by lapse of time, be valid and remain in full force until the expiration of the sentence inflicted upon the prisoner in England, although exemption from punishment for the extradition crime may have then taken place in the foreign country by lapse of time ; and a writ of habeas corpus to bring up and discharge the prisoner upon the ground that the extradition offence is no longer punishable in the foreign country will not be granted. THE KING *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* VAN DER AUWERA - **Div. Ct. 157**

2. —— *Discharge of Criminal—Exemption from Punishment acquired by Lapse of Time—Treaty between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals of May* 14, 1872, *arts.* 4, 5.

By art. 4 of the Treaty between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals of May 14, 1872, it is

EXTRADITION—*continued.*
provided that extradition shall not take place if the person claimed has already been tried and discharged.

By art. 5 of the treaty extradition shall not take place if exemption from prosecution or punishment has been acquired by lapse of time according to the laws of the State applied to.

A criminal was by a competent Court in Germany sentenced to a term of imprisonment for several extradition crimes. Before the term had expired he was, under an article of the Criminal Procedure Ordinance of the German Empire, released from custody on account of his health, but with the liability to be called upon subsequently to serve the residue of the term of imprisonment. At a subsequent date, when the term of imprisonment, if it had been served continuously, would have expired, the criminal was called upon by the competent authority in Germany to serve the residue of the term :—

Held, (1.) that he had not been discharged within the meaning of art. 4 of the treaty ; and (2.) that exemption from punishment had not been acquired by lapse of time according to the laws of the State applied to within the meaning of art. 5 of the treaty ; and that the criminal was liable to be extradited. THE KING *v.* GOVERNOR OF BRIXTON PRISON. *Ex parte* CALBERLA - - - - **Div. Ct. 861**

FACTOR — *Mercantile Agent — Possession of Goods—Consent of Owner—Larceny by a Trick —Person taking in Good Faith under Disposition by Mercantile Agent—Purchase on Joint Account—Bad Faith on part of One of Two Joint Purchasers—Factors Act,* 1889 (52 *&* 53 *Vict. c.* 45), *s.* 2, *sub-s.* 1.

Where a mercantile agent, who is in possession of goods with the consent of the owner, makes, without the authority and in fraud of the owner, a sale of them to joint purchasers, who act as partners in the particular transaction of the purchase of them as a speculation, and one of the joint purchasers does not act in good faith, the other joint purchasers, although they personally act in good faith, are not within the protection given by the Factors Act, 1889, s. 2, sub-s. 1.

Semble, where the circumstances under which a mercantile agent has obtained possession of goods from their owner are such as to render him guilty of larceny by a trick, he cannot be said to be in possession of the goods with the consent of the owner within the meaning of the above-mentioned section.

Decision of Channell J., [1907] 1 K. B. 519, in part reversed. OPPENHEIMER *v.* FRAZER & WYATT - - - - - - **C. A. 50**

FACTORY — *Workshop — Exercise of Manual Labour — "Article" — Natural Flowers made into Bouquets — Factory and Workshop Act,* 1901 (1 *Edw.* 7, *c.* 22), *s.* 149.

The respondents carried on the business of retail florists, and employed a number of young women and girls, whose duties consisted partly in serving customers in the shop and partly in making up natural flowers into wreaths, crosses and bouquets, and arranging floral decorations,

FACTORY—*continued.*
for which purposes frames of wood or wire were sometimes used, in a room behind the shop :—
Held, that the room was a place in which manual labour was exercised by way of trade in or incidental to the making of an article, or the adapting for sale of an article, within s. 149 of the Factory and Workshop Act, 1901, and that the room was, therefore, a workshop within the Act. HOARE *v.* ROBERT GREEN, LD.
Div. Ct. 315

—— Workmen's Compensation Act.
See under EMPLOYER AND WORKMAN.

FEES—Licensing Acts—Claim by clerk to justices to fees in respect of witnesses called in opposition to grant - 526
See LICENSING ACTS. 2.

FINANCE ACTS.
See under REVENUE.

FINE—Lease—Covenant not to assign without consent—Payment for leave to assign
See LANDLORD AND TENANT. 1. 494

FINES AND RECOVERIES ACT—Actual tenant in tail—Restraint on barring estate
See REVENUE. 3. 940

FLATS — Poor rate — Valuation — Deductions from gross value - - - - 323
See LONDON. 4.

FLOWERS — Workshop — Exercise of manual labour — "Article" — Natural flowers made into bouquets - - - 315
See FACTORY.

FOOD AND DRUGS—Sale of.
See under ADULTERATION.

FOREMAN — Dangerous machinery — Infant workman — Duty of employer to instruct—Delegation to foreman—Negligence of foreman - - 548, 646
See EMPLOYER AND WORKMAN. 8, 9.

—— Negligence—Dangerous employment—Infant—Duty to instruct—Delegation of duty—Liability of master - 548, 646
See EMPLOYER AND WORKMAN. 8, 9.

FORFEITURE — Lease — Forfeiture for non-payment of rent — Under-lessee — "Tenant"—Relief against forfeiture 8
See LANDLORD AND TENANT. 2.

FOWLS — Straying on highway — Damage to passenger — Liability of owner — Remoteness - - - - - 345
See TRESPASS.

FRANCHISE.
See under PARLIAMENT.

FRAUD—Insurance agent—Avoidance of policy—Recovery back of premiums - 242
See INSURANCE, LIFE.

—— Insurance, Marine — Open cover slip — Damages—Fraudulent representations—Reinsurance—Subrogation - 814
See INSURANCE, MARINE. 1.

—— Promissory note—Signature in blank—Fraudulent negotiation of note by agent Rights of bona fide indorsee for value
See NEGOTIABLE INSTRUMENT. 735

FUGITIVE CRIMINALS—Extradition—Treaty between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals of May 14, 1872, arts. 4, 5
See EXTRADITION. 2. 861

GERMANY—Extradition—Treaty between Great and Germany for the Mutual Surrender of Fugitive Criminals of May 14, 1872, arts. 4, 5 - - - - - - 861
See EXTRADITION. 2.

GREAT WESTERN RAILWAY COMPANY (RATES AND CHARGES) PROVISIONAL ORDER CONFIRMATION ACT, 1891 — Demurrage of trucks—Right of action for damages for detention - - - - - - - 664
See RAILWAY. 4.

GUARANTEE—Devastavit—Statute of Limitations—Claim on guarantee - - 350
See EXECUTOR.

GUN—Air-gun—Toy or weapon—Sale by retail
See PISTOLS. 630

HIGHWAY — *Ditch alongside of — Whether Part of Highway—Extent of Dedication.*
There is no rule of law that a ditch running alongside a highway between the road and the fence cannot be dedicated as part of the highway merely because it is not part of the roadway and cannot be used by the public for purposes of passage.
Decision of a Divisional Court, [1906] 2 K. B. 612, affirmed. CHORLEY CORPORATION *v.* NIGHTINGALE - - - - C. A. 637

2. —— "*Extraordinary Traffic — Extraordinary Expenses*" — *Repair of Highway — Limitation of Time for bringing Action—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1.
By the Locomotives Act, 1898, s. 12, sub-s. 1 (*a*), extraordinary expenses incurred by a highway authority in repairing a highway by reason of damage caused by extraordinary traffic thereon are recoverable by an action in the High Court or county court, and by sub-s. 1 (*b*) proceedings for the recovery of such expenses "shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work."
It being conceded, having regard to *Kent County Council* v. *Folkestone Corporation*, [1905] 1 K. B. 620, that where the damage was caused by work done under a building contract, or work extending over a long period, an action for recovery of expenses was in time if brought either within twelve months of the doing of the damage, or within six months after the completion of the contract or work :—
Held, that "the completion of the contract" meant the completion of the contract so far as it related to the work causing the damage which gave rise to the action.

HIGHWAY—*continued.*

Therefore where the damage was caused by work done under a contract which the Court assumed to be a building contract, and the contract contained a maintenance clause which provided that the entire work should be at the risk of the contractor for a certain period after completion :—

Held, that the contract was completed, within the meaning of sub-s. 1 (*b*), at the date of the completion of the work, and that the six months began to run from that date. LANCASTER RURAL COUNCIL *v.* FISHER AND LE FANU **C. A. 516**

3. —— *Repair of Highway—Extraordinary Traffic—Recovery of Expenses—Limitation of Time for bringing Action—Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*b*).

The defendants, a municipal corporation, entered into two similar contracts for the haulage by contractors respectively of flints and ragstone for the period between March 31, 1904, and March 31, 1905. The plaintiffs, as the authority liable to repair highways in the district, incurred extraordinary expenses in repairing a highway in consequence of damage done to the highway between March 31, 1904, and March 31, 1905, by extraordinary traffic conducted over the highway in the haulage of the flints and ragstone. The flints and ragstone were required by the defendants from time to time for their general purposes, there being some evidence to shew that they were used mainly for the construction of new streets. The last load under the contracts was carried on March 31, 1905, and the action was commenced on August 22, 1905, the claim being in respect of the damage done to the highway between March 31, 1904, and March 31, 1905 :—

Held, that the work done under each of the two contracts ought to be treated as similar to work done under a "building contract," and as "work extending over a long period," within the meaning of s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898 ; and that, inasmuch as the action had been commenced within six months after the completion of the work, the plaintiffs were entitled to recover the amount of the extraordinary expenses incurred by them by reason of the damage done from March 31, 1904, to March 31, 1905, in the execution of the contracts. BROMLEY RURAL DISTRICT COUNCIL *v.* CROYDON CORPORATION - **Walton J. 39**

—— Fowls straying on—Damage to passenger—Liability of owner—Remoteness - **345**
See TRESPASS.

HUSBAND AND WIFE—*Judicial Separation—Permanent Alimony—Order of Probate and Divorce Division—Arrears—Action to Recover—Practice.*

No action will lie in the King's Bench Division to recover arrears of permanent alimony payable under an order of the Probate and Divorce Division, such an order not being a final and conclusive judgment upon which an action of debt to enforce it may be maintained.

Bailey v. *Bailey*, (1884) 13 Q. B. D. 855, applied. ROBINS *v.* ROBINS - **Joyce J. 13**

HUSBAND AND WIFE—*continued.*

—— Poor law—Pauper lunatic—Order against husband—Liability of son to contribute
See POOR LAW. 1. **301**

INCLOSURE ACT—*Award—Herbage on Road—Property vested in Parishioners—Damage—Right of Action—District Council or Parish Council—Injury to limited Section of Public—Attorney-General—Right to join as Plaintiff—Local Government.*

By an award made in 1801 under an Inclosure Act the grass and herbage growing in a private road in a parish was to be let yearly by the surveyor of highways or by such other person as the parishioners in vestry assembled should appoint, and the money arising therefrom was to be expended in the repair of the public and private roads in the parish. The defendants caused damage to the letting value of the grass and herbage by wrongfully permitting cattle to graze in the road, and an action was brought against them by the Attorney-General, on the relation of the rural district council, and by the district council for an injunction and damages :—

Held, that the action failed, as regards the district council, because the right of property in the grass and herbage was vested in the parish council and not in the district council ; and as regards the Attorney-General, because the right of property which had been injured was one enjoyed by only a limited section of the public, namely, the parishioners, and not by the public at large. ATTORNEY-GENERAL AND SPALDING RURAL COUNCIL *v.* GARNER - **Channell J. 480**

INCOME TAX.
See under REVENUE.

INDORSEMEMT—Bill of exchange—Indorsement by way of security—Circuity of action - - - - - - **507**
See BILL OF EXCHANGE.

INFANT—Dangerous employment—Infant—Duty to instruct—Delegation of duty—Foreman—Negligence - - **548**
See EMPLOYER AND WORKMAN. 8.

—— Dangerous machinery—Infant workman—Duty of employer to instruct—Delegation to foreman—Negligence of foreman - - - - - **646**
See EMPLOYER AND WORKMAN. 9.

—— Intoxicating liquors—Sale to children—Prohibition of exceptions - - **513**
See LICENSING ACTS. 5.

—— Workmen's Compensation Act—Posthumous child - - - - - - **422**
See EMPLOYER AND WORKMAN. 3.

INFORMATION—Execution of work in contravention of by-law—Continuing offence
See LOCAL GOVERNMENT. 2. **273**

INLAND REVENUE.
See under REVENUE.

INSURANCE, ACCIDENT—*Policy—Condition in Policy—Immediate Notice of Accident—Omission to give Notice—Insurer's Liability.*

A policy of insurance covering the liability of an employer to compensate his workmen for

INSURANCE, ACCIDENT—*continued.*

injuries by accident in the course of their employment was made subject to a condition that the employer should give immediate notice of any accident causing injury to a workman, and to a further condition that the observance and performance by the employer of the times and terms set out in the policy, so far as they contained anything to be done by the employer, were the essence of the contract.

On December 28, 1904, the employer signed a proposal form for the insurance and received a covering note, to which no conditions were attached. On January 3, 1905, the insurers sealed, and on January 9 delivered to the employer, the policy in question, which expressed that it was to be in force from January 1, 1905, to January 1 in the following year. On January 2, 1905, a workman in the employ of the assured was injured by an accident, which was believed to be slight, and of which notice was not given at the time to the insurers. Dangerous symptoms supervened, and the injured workman died on March 15; notice of the accident was given by the employer to the insurers on March 14, the day before the workman's death. The insurers repudiated all liability under the policy, on the ground (among others) that immediate notice of the accident was not given by the employer in accordance with the condition in the policy, and that the condition was a condition precedent to the right of the employer to recover. A claim for compensation by the widow was properly settled by the employer for a reasonable sum, and the claim of the latter against the insurers was referred to an arbitrator under the arbitration clause in the policy. The arbitrator held that the conditon as to giving immediate notice of injury was a condition precedent, but stated his award in the form of a special case for the opinion of the Court, which reversed the arbitrator's decision. Upon appeal by the insurers:—

Held by Vaughan Williams L.J. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that, in the absence of evidence that the employer either knew of, or had the opportunity of knowing of, the existence of the condition at the date of the accident, the condition was one with which it was impossible to comply; that, as regards a risk which resulted in a claim before the insured had knowledge of the condition, the true inference was that the insurers never imposed the condition on the employer, and that the latter was therefore entitled to recover on the policy.

Quære whether upon the construction of the policy as a whole, apart from the particular circumstances, the condition was a condition precedent.

In re COLEMAN'S DEPOSITORIES, LD. AND LIFE AND HEALTH ASSOCIATION - **C. A. 798**

INSURANCE, LIFE—*Fraud of Insurance Agent—Avoidance of Policy—Recovery back of Premiums.*

By a policy of life insurance the defendants, in consideration of the payment by the plaintiff of a weekly premium, contracted to pay to the plaintiff a certain sum upon the death of a third person. After the policy had been on foot for

INSURANCE, LIFE—*continued.*

a year the plaintiff proposed to let it lapse, whereupon the defendants' agent, with the view of inducing her to continue the payment of the premiums, falsely, and without the authority of the defendants, represented to her that if she continued paying the premiums for four more years she would be entitled to a free policy, that is to say, that, though the policy would remain in force, she would on the expiration of that period have no further premiums to pay. Relying on that representation, she continued to pay the premiums for the further period of four years, but on the expiration of that period the defendants refused to give her a free policy. In an action brought to recover back the premiums paid by her since the date of the false representation made, the defendants contended that, as during the whole of the four years she was protected against the contingency of the life insured dropping, there had not been a total failure of consideration, and that the policy could not be treated as void:—

Held, that, the contract contained in the policy being under the circumstances voidable at the plaintiff's option, the fact of the defendants having been at risk during the four years was no bar to the exercise of her option to avoid it, and that the premiums consequently could be recovered back. KETTLEWELL *v.* REFUGE ASSURANCE CO. - - - - **Div. Ct. 242**

INSURANCE, MARINE — *Open cover Slip — Damages—Fraudulent Representations—Reinsurance — Subrogation — Costs — Solicitor and Client Costs.*

The plaintiffs gave the defendants an open cover slip by which they undertook to reinsure the defendants to the extent of one half their interest up to 1000*l.* on certain shipments of lumber. Pursuant to the cover slip, the plaintiffs reinsured the defendants by two policies respectively on interests by two vessels. Under the policies the defendants claimed and were paid by the plaintiffs sums amounting to 1354*l.* 4*s.* 10*d.* The defendants subsequently recovered from the shipowners damages by reason of having been induced to pay losses on the two vessels by fraudulent misrepresentations of an official in their employment. The measure of the damages so recovered by the defendants was the sum which upon inquiry appeared to flow from the liability of the defendants as insurers in respect of the two vessels, and included the 1354*l.* 4*s.* 10*d.* The plaintiffs then sued the defendants for the repayment of the 1354*l.* 4*s.* 10*d.* as money received by them to the use of the plaintiffs:—

Held, (1.) that the plaintiffs were entitled, upon the principles laid down by Brett L.J. and Bowen L.J. in *Castellain* v. *Preston*, (1883) 11 Q. B. D. 380, to recover the 1354*l.* 4*s.* 10*d.* upon the ground that the money was obtained by the defendants by enforcing a right which diminished the defendants' loss, and that therefore the doctrine of subrogation applied; (2.) that the defendants were entitled to deduct from the 1354*l.* 4*s.* 10*d.* the reasonable expenses of recovering that sum from the owners.

Hatch, Mansfield & Co. v. *Weingott*, (1906) 22 Times L. R. 366, followed. ASSICURAZIONI

INSURANCE, MARINE—*continued.*
GENERALI DE TRIESTE *v.* EMPRESS ASSURANCE CORPORATION, LD. - - **Pickford J. 814**

2. —— *Warranty of Freedom from Capture —Capture of Ship — Condemnation — Relation back of Title of Captors.*
Although the capture of a ship by belligerents does not of itself divest the owner's property in her, upon the ship being subsequently condemned by a prize court the title of the captors relates back to the date of the capture. ANDERSEN *v.* MARTEN - - - - **Channell J. 248**

3. —— "*Whilst at Port or Ports, Place or Places*"—*Vessel striking on Reef.*
A ship was insured whilst at port or ports, place or places in New Caledonia. Whilst within the geographical limits of New Caledonia, and on her way to a port in that island, she struck upon a reef and incurred losses:—
Held, that the words "place or places," occurring in connection with the words "port or ports," meant place or places at which the vessel might arrive with some object other than that of merely passing on her way to some other point; that the vessel was not, therefore, "at a port or ports, place or places in New Caledonia" within the meaning of the policy; and that the insurers were not liable. MARITIME INSURANCE CO. *v.* ALIANZA INSURANCE CO. OF SANTANDER **Walton J. 660**

INTEREST—Bankruptcy, Trustee in—Penal interest—Whether payable to bankrupt's estate or to the Treasury - - **36**
See BANKRUPTCY. 5.

INTERPLEADER—*County Court—Execution—Goods belonging neither to the Execution Debtor nor to the Claimant—Money paid into Court, who entitled to—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 156.
Goods, which had been taken in execution upon a county court judgment, were claimed by the grantees of a bill of sale upon them, hereinafter called "the claimants," who deposited under s. 156 of the County Courts Act, 1888, a sum of money as representing the value of the goods. The high bailiff of the county court thereupon withdrew from possession of the goods, and issued an interpleader summons in the county court with regard to the money in court. Subsequently E. D. & Co. gave notice to the high bailiff of a claim to part of the goods, as having been let by them to the execution debtor on a hire-purchase agreement, and the claimants gave notice to the high bailiff that they withdrew their claim to those goods. The high bailiff gave notice of the claim of E. D. & Co. to the execution creditor, who thereupon gave notice to the high bailiff that he admitted their title to those goods. Upon the hearing of the interpleader summons the county court judge held that the above-mentioned bill of sale was invalid, and he thereupon ordered that a part of the money in court proportionate to the value of the goods which had not been claimed by E. D. & Co. should be paid out to the execution creditor, but that the remainder of the money

INTERPLEADER—*continued.*
should be paid back to the claimants. On appeal the Divisional Court affirmed his decision:—
Held (reversing the judgment of the Divisional Court), that the execution creditor, upon the failure of the claimants to prove a title to any of the goods, was entitled to the whole of the money in court. WELLS *v.* HUGHES. DISTRICT LOAN CO., Claimants - - **C. A. 845**

INTERROGATION—Admissibility—Action for seduction—Disclosure of names—Discovery - - - - - **18**
See PRACTICE. 2.

INTERROGATORY.
See under DISCOVERY.

INTOXICATING LIQUORS.
See under LICENSING ACTS.

JOINDER—Causes of action—Leave of Court or judge—Leave given after issue of writ —Waiver of objection by defendant
See PRACTICE. 3. **727**

—— Several causes of action—Payment of lump sum into Court - - - - **290**
See PRACTICE. 4.

JUDGMENT—Bankruptcy of judgment debtor —Execution under writ of fi. fa.—Absence of overt act by sheriff of seizure of money - - - - - **437**
See SHERIFF. 1.

JUDICIAL SEPARATION—Permanent alimony —Order of Probate and Divorce Division—Arrears—Action to recover - **13**
See HUSBAND AND WIFE.

JURISDICTION — Bankruptcy — Conditional order of discharge—Revocation of order
See BANKRUPTCY. 2. **166**

—— Costs, Security for — Appeal to King's Bench Division from official referee—Inherent jurisdiction of High Court **106**
See PRACTICE. 1.

—— Justices—Threatened breach of the peace—No formal charge—Power to bind over —Form of order - - - - **380**
See JUSTICES. 1.

—— London Building Act—Railway company —Interference with exercise of statutory powers of—Appeal to tribunal of appeal
See LONDON. 1. **91**

—— London—Party wall—Compensation for damage to trade — Jurisdiction of surveyors - - - - - **822**
See LONDON. 3.

—— Money-lender, Proof of debt by—Withdrawal of proof—Jurisdiction of Bankruptcy Court to grant relief- - **868**
See BANKRUPTCY. 8.

—— Pension of police constable — Quarter sessions—Jurisdiction of High Court—Case stated from quarter sessions - **591**
See JUSTICES. 2.

—— Private street works—Provisional apportionment — Lands extra commercium
See STREETS. 3. **130**

JURISDICTION—*continued.*

—— Private street works—Summary jurisdiction — Right of appeal to quarter sessions - - - - - - **96**
See STREETS. 2.

—— Railway—Demurrage of trucks—Right of action for damages for detention—Jurisdiction - - - - - **664**
See RAILWAY. 4.

—— Solicitor—Undertaking to pay money to person not client—Disciplinary jurisdiction of Court - - - - **539**
See SOLICITOR. 2.

—— Summary jurisdiction—Offences against the Person Act - - - - **296**
See CRIMINAL LAW. 2.

—— Summary jurisdiction — Special case—Application for service on justices **104**
See PRACTICE. 5.

JUSTICES—Adulteration — Milk — Written warranty - - - - - - **80**
See ADULTERATION.

—— Alien, Undesirable — Expulsion order—Liability of master of ship bringing alien to the United Kingdom - **997**
See ALIEN.

—— Dog—Not kept under control—"Dangerous"—Evidence — Attacks on sheep
See DOG. **88**

—— Extradition—Belgium, Crime committed in - - - - - - - **157**
See EXTRADITION. 1.

—— Extradition—Treaty between Great Britain and Germany for the Mutual Surrender of Fugitive Criminals of May 14, 1872, arts. 4, 5 - - - - **861**
See EXTRADITION. 2.

—— Factory—Workshop—"Article"—Natural flowers made into bouquets - - **315**
See FACTORY.

—— Highway, Repair of—Extraordinary traffic—Recovery of expenses—Limitation of time for bringing action - - **39**
See HIGHWAY. 3.

—— Information—Execution of work in contravention of by-law — Continuing offence - - - - - - **273**
See LOCAL GOVERNMENT. 2.

—— Intoxicating liquors — Sale to children
See LICENSING ACTS. 5. **513**

1. —— *Jurisdiction—Threatened Breach of the Peace—No formal Charge—Power to bind over—Form of Order—No Averment as to going in Bodily Fear.*

On the hearing by justices of a summons against a defendant for threatening to assault the complainant, the defendant alleged that the complainant had used threatening language towards him, but he made no formal charge against the complainant. The justices, after hearing the evidence of the complainant and the defendant, found as a fact that there was a real danger of a breach of the peace on the part of both parties, and they ordered both of them to

JURISDICTION—*continued.*

be bound over to be of good behaviour. The order made against the complainant, as drawn up, contained no averment that the defendant went in bodily fear of the complainant:—

Held, that the justices had, in the circumstances, power to order the complainant to be bound over, and that the absence from the order of an averment that the defendant went in bodily fear of the complainant did not render it bad on its face. THE KING *v.* WILKINS
Div. Ct. 380

—— Licensing Acts.
See under LICENSING ACTS. 2.

—— London—Buildings—"Structure"—Erection beyond general line of buildings
See LONDON. 2. **45**

—— Motor car — Conviction for driving at excessive speed—Indorsement on licence—First or second offence—Parks Regulation Act - - - - **638**
See MOTOR CAR.

—— Offences against the Person Act—Summary jurisdiction - - - - - **296**
See CRIMINAL LAW. 2.

—— Pawnbroker—Pledge—Neglect to deliver to pledgor—Reasonable excuse—Loss of pledge - - - - - - **685**
See PAWNBROKER. 2.

—— Pistols—Air-gun—Toy or weapon—Sale by retail - - - - - - - **630**
See PISTOLS.

—— Poor law.
See under POOR LAW.

—— Poor rate.
See under RATES.

2. —— *Quarter Sessions — Jurisdiction of High Court—Practice—Case stated from Quarter Sessions—Enactment that Orders of Quarter Sessions shall be Final—Pension of Police Constable—Police Act*, 1890 (53 *&* 54 *Vict. c.* 45), *s.* 11.

By s. 11 of the Police Act, 1890, it is provided that in certain cases within the section, where a constable is aggrieved by the decision of the police authority, he may apply to a Court of quarter sessions, and "that Court, after inquiry into the case, may make such order in the matter as appears to the Court just, which order shall be final."

Where a recorder sitting in quarter sessions had, on an application under the above-mentioned section, made an order, subject to a case for the opinion of the High Court:—

Held, that the terms of the section did not prevent the King's Bench Division from entertaining and dealing with the case.

Westminster Corporation v. *Gordon Hotels, Ld.*, [1907] 1 K. B. 910, distinguished. KYDD *v.* LIVERPOOL WATCH COMMITTEE - **C. A. 591**

—— Rates.
See under RATES.

—— Riot—Persons riotously and tumultuously assembled — Building injured or destroyed—Damages - - **853**
See CRIMINAL LAW. 1.

JURISDICTION—*continued.*

—— Schools.
See under SCHOOLS.

—— Slaughter-house — Licence — Condition—Limitation of time - - - **396**
See SLAUGHTER-HOUSE. 1.

—— Slaughter-house — Licence — Towns Improvement Clauses Act - - **278**
See SLAUGHTER-HOUSE. 2.

—— Special case—Application for service on justices—Summary jurisdiction - **104**
See PRACTICE. 5.

—— Street—Channelling— By-laws — Validity of — Reasonableness — Uncertainty
See STREETS. 1. **283**

—— Street—Private street works—Objections—Determination by Court of summary jurisdiction—Right of appeal to quarter sessions - - - - - - **96**
See STREETS. 2.

—— Street—Private street works—Provisional apportionment — Lands extra commercium - - - - - - **130**
See STREETS. 3.

—— Water.
See under WATER.

—— Water-closets, power to order substitution of water-closets for existing privies—Bradford improvement - - **385**
See WATER-CLOSETS.

LAND TAX—Redemption of, on lands—Liability to assessment of coal mines under redeemed lands - - - - - **446**
See REVENUE. 5.

LANDLORD AND TENANT—*Lease—Assign—Covenant not to Assign without Consent—Payment for Leave to Assign—"Fine or Sum of Money in the Nature of a Fine"—Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 3.

Sect. 3 of the Conveyancing Act, 1892, does not make illegal the demanding of a fine as a condition of giving a licence or consent to the assignment of a lease which contains a covenant against assignment without consent; it merely makes the payment of a fine something not contracted for. The parties to the lease may therefore agree that a fine shall be paid for the granting of the licence. ANDREW *v.* BRIDGMAN **Channell J. 494**

2. —— *Lease—Forfeiture for Non-payment of Rent — Underlessee — "Tenant" — Relief against Forfeiture — Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 212.

On an application under s. 212 of the Common Law Procedure Act, 1852, for relief against forfeiture of a head-lease for non-payment of rent by an underlessee, it is not necessary for the applicant to prove his title as underlessee or assignee of the original lessee; the fact that the applicant is "tenant" in possession is sufficient.

Dictum of Erle J. in *Doe* d. *Wyatt* v. *Byron*, (1845) 1 C. B. 623, at p. 634, applied. MOORE *v.* SMEE & CORNISH - - - - **C. A. 8**

LANDLORD AND TENANT—*continued.*

3. —— *Liability of Landlord for Injury happening to Stranger during Tenancy—Landlord under no contractual Liability to Repair—Repairs in fact done by Landlord—Negligence of Landlord's Servants in Executing Repairs—Nuisance.*

The defendants, who were the owners of considerable house property, let a house to a tenant, who subsequently sub-let it to a company, whose manager resided on the premises with his wife (the plaintiff) and his family: the defendants were not liable to do any repairs to the house. In the lavatory of the house was a water tank, which became insecure, owing, as was alleged, to the vibration caused by an engine and machinery upon adjoining premises of the defendants, which were used by them for the purpose of generating electricity for the lighting of their property. Complaints of the insecurity of the water tank were made by the plaintiff and her husband to the tenant, who forwarded them to the defendants. Ultimately the defendants sent two workmen, who were their own servants, to do the necessary repairs, and an iron bracket was fixed underneath the tank to support it. Three months afterwards the bracket fell upon the plaintiff and seriously injured her. The jury found that the bracket fell by reason of the working of the defendants' engine, that the working of the engine amounted to a nuisance, and that the work of repair in putting up the bracket was done in an improper and negligent manner and the apparatus left in a condition dangerous to persons properly using the lavatory:—

Held, first, that the plaintiff had no cause of action against the defendants on the ground of nuisance, because she had no interest in the premises or right of occupation in the proper sense of the term; secondly, that she could not recover on the ground of negligence, for there was no contractual relation between the plaintiff and the defendants, and the doing of the repairs was a voluntary act on the part of the defendants not done in the discharge of a duty to the plaintiff; and that, as the defendants had no control of the premises, there was no invitation on their part to the plaintiff, but at the utmost an innocent representation as to the state of the premises, which, as they had employed apparently competent men to do the repairs, gave the plaintiff no cause of action. MALONE *v.* LASKEY - - - - **C. A. 141**

LARCENY — Mercantile agent — Possession of goods—Consent of owner—Larceny by a trick - - - - - - **50**
See FACTOR.

LEASE.
See under LANDLORD AND TENANT.

LIABILITY—Of landlord for injury happening to stranger during tenancy—Repairs—Negligence - - - - - **141**
See LANDLORD AND TENANT. 3.

LIBEL — Practice — Interrogatory — Defence—Fair comment—Express malice - **626**
See DISCOVERY.

LICENCE—Carriage licence—Cars on light railway - - - - - - - 991
See REVENUE. 1.

—— Licensing Acts.
See under LICENSING ACTS.

—— Slaughter-house—Local government - 278
See SLAUGHTER-HOUSE. 2.

LICENSING ACTS—*Conditional Licence—Hours of opening—Application for occasional Licence—Licensing Acts*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 4; 1872 (35 *&* 36 *Vict. c.* 94), *s.* 29.

The respondent was granted in 1906, under s. 4 of the Licensing Act, 1904, a licence in respect of certain premises for the period of two years upon the condition that the premises should only be open for the sale of intoxicating liquors between the hours of noon and 2 P.M. During the currency of the licence the respondent applied to the justices in petty sessions, under s. 29 of the Licensing Act, 1872, for an occasional licence exempting him from closing the premises on December 17, 1906, between the hours of 7 P.M. and 11 P.M. The justices granted the occasional licence asked for:—

Held, that they had power to do so. GROH *v.* HESKETH - - - - - Div. Ct. 232

2. —— *Fees—Application for grant of New Licence—Claim by Clerk to Justices to Fees in respect of Witnesses called in Opposition to Grant—Justices' Clerks Act*, 1877 (40 *&* 41 *Vict. c.* 43), *s.* 8—*Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 15.

Sect. 15 of the Alehouse Act, 1828, which provides the sums which are payable by the person to whom a licence is granted, is exhaustive. Therefore the clerk to the justices of a petty sessional division is not entitled to receive a fee for the administration of the oath to a witness called at an adjourned annual licensing meeting of the justices to give evidence in opposition to an application for the grant of a licence. WHITTUCK *v.* WITHY
Div. Ct. 526

3. —— *Principal and Agent—Sale by licensed Agent on behalf of unlicensed Principal—Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 3—*Sale of Liquor without Licence.*

Where intoxicating liquor is sold by retail by an agent on behalf of the owner, the sale is, for the purposes of s. 3 of the Licensing Act, 1872, which prohibits the sale of intoxicating liquors by an unlicensed person, a sale by the owner and not by the agent; and, if the owner is not duly licensed to sell intoxicating liquor, the fact that the agent who conducted the sale was so licensed affords him no defence. DUNNING *v.* OWEN - - - - - Div. Ct. 237

4. —— *Renewal of Licence—Reference to Quarter Sessions—Report of Licensing Justices—Matters not stated in Report—Evidence—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 1, *sub-s.* 2.

On the hearing by a committee of quarter sessions of an application for the renewal of a licence which has been referred to quarter sessions by the licensing justices under s. 1, sub-s. 2, of the Licensing Act, 1904, evidence as to the structural condition and the state of repair of the premises in question is admissible

LICENSING ACTS—*continued.*

for the purpose of differentiating the premises from other licensed premises in the neighbourhood, although there is no mention thereof in the report of the licensing justices. HOWE *v.* NEWINGTON LICENSING JUSTICES
Div. Ct. 340

5. —— *Sale to Children—Prohibition of—Exceptions—Intoxicating Liquors (Sale to Children) Act*, 1901 (1 *Edw.* 7, *c.* 27), *s.* 2.

Sect. 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, provides that every person who knowingly sends a child under the age of fourteen years to a public-house for the purpose of obtaining any description of intoxicating liquor, "excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint," shall be guilty of an offence:—

Held, that the mere fact that the vessel with which a child is sent to fetch liquor is capable of being corked and sealed by the vendor after being filled is not enough to bring the sender within the exception.

Per Lord Alverstone C.J.: There must be evidence that the sender intended that the vessel in which the liquor was to be delivered to the child should be corked and sealed before delivery.

Per Darling and A. T. Lawrence, JJ.: The exception applies only to the case of liquor which is sold in a corked and sealed vessel belonging to the vendor, and the purchaser is not entitled to send a child with an empty bottle in which to fetch the liquor, whether intended to be corked and sealed or not.

Semble, that the sending of a child for less than a reputed pint, although to be purchased in a corked and sealed vessel, would be an offence within the section. FARNDALE *v.* DILLON
Div. Ct. 513

LIFE INSURANCE.
See under INSURANCE, LIFE.

LIGHT RAILWAYS.
See under RAILWAY.

LIMITATION OF TIME — Highway — Extraordinary traffic—Repair of highway—Recovery of expenses—Limitation of time for bringing action - - 39
See HIGHWAY. 3.

—— Highway—Repair—Limitation of time for bringing action - - - - 516
See HIGHWAY. 2.

LIMITATIONS, STATUTE OF—Devastavit—Claim on guarantee - - - 350
See EXECUTOR.

LOCAL GOVERNMENT—*Auditor—Certiorari—Right of Court to review Surcharge—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 247, *sub-s.* 8—*Poor Law Amendment Act*, 1844 (7 *&* 8 *Vict. c.* 101), *s.* 35.

On an application for a certiorari under s. 247, sub-s. 8, of the Public Health Act, 1875, to remove a disallowance and surcharge by an auditor, the Court has power to deal with the

LOCAL GOVERNMENT—*continued.*
merits, and is not confined to the question of jurisdiction.

Reg. v. *Haslehurst*, (1887) 51 J. P. 645, followed. THE KING *v.* CARSON ROBERTS **Div. Ct. 878**

2. —— *Information—Execution of Work in Contravention of By-law—Continuing Offence—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 158.

Where an information charged the appellant with executing certain work in contravention of the by-laws of a local authority, and it was proved that he was responsible for the continued existence of the work after receiving notice that it was in contravention of the by-laws :—

Held, that he might be convicted on this information by virtue of s. 158 of the Public Health Act, 1875, of a continuing offence as well as of the offence specifically charged. AIREY *v.* SMITH - - - - - - **Div. Ct. 273**

—— Compensation—Loss of "office"—"Place, situation, or employment" - - **617**
See COMPENSATION.

—— Inclosure Act—Award—Herbage on land—Right of action—Injury to limited section of public - - - - **480**
See INCLOSURE ACT.

—— Poor law.
See under POOR LAW.

—— Sewers.
See under SEWERS.

—— Slaughter-house—Licence - - **278**
See SLAUGHTER-HOUSE. 2.

—— Streets.
See under STREETS.

—— Water-closets.
See under WATER-CLOSETS.

LOCOMOTIVES—Highway — Repair — "Extraordinary traffic" — "Extraordinary expenses" — Limitation of time for bringing action - - - - **516**
See HIGHWAY. 2, 3.

—— Motor car.
See under MOTOR CAR.

LONDON—*Buildings—General Building Line — Certificate of superintending Architect — Railway Company—Interference with Exercise of Statutory Powers of—Appeal to Tribunal of Appeal—Jurisdiction—London Building Act*, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 31.

The tribunal of appeal under the London Building Act, 1894, has no jurisdiction to entertain an appeal by a railway company against a certificate of the superintending architect defining the general line of buildings in a street if the only ground of the appeal is that the certificate would affect the exercise of powers conferred on the railway company by their special Acts. SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE *v.* LONDON COUNTY COUNCIL - **Div. Ct. 91**

2. —— *Buildings—"Structure"—Erection beyond general Line of Buildings—Show-case of Wood and Glass—London Building Act*, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 22 ; *s.* 200, *sub-s.* 3 (*a*) *—London Building Act*, 1894 (*Amendment*) *Act*, 1898 (61 *&* 62 *Vict. c. cxxxvii.*), *s.* 7.

The respondents carried on business at premises the front main wall of which stood back about seven feet from the public way. The front door of the premises was in the front main wall, and was approached from the public footway by a flight of four stone steps and a stone landing at the top of the steps. The respondents, without the consent of the London County Council, erected upon the steps and landing a show-case of wood and glass, the length of which was 7 ft. 6 in., the width 1 ft. 10 in., and the height above the street level 9 ft. 3 in. The show-case stood upon the respondents' property, and took the place of a shop front, which projected 6 ft. 3 in. beyond the general line of buildings. The houses in the street in which the respondents' premises were situated had bay windows in front of the general line of buildings, and the show-case was slightly in front of the bays :—

Held, that the show-case was not a "structure" within the meaning of s. 22 of the London Building Act, 1894, and that the respondents, by erecting it without the consent of the council, had not acted in contravention of that section. LONDON COUNTY COUNCIL *v.* HANCOCK & JAMES - - - **Div. Ct. 45**

3. —— *Party Wall—Settlement of Difference between Building and Adjoining Owners—Compensation for Damage to Trade—Jurisdiction of Surveyors—London Building Act*, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 88, *sub-s.* 6 ; *s.* 91.

Where a difference has arisen between a building owner and an adjoining owner under s. 90 of the London Building Act, 1894, with respect to the raising of a party wall under s. 88, sub-s. 6, of that Act, the surveyors appointed under s. 91 of the Act to settle that difference have no jurisdiction to entertain a claim for compensation by the adjoining owner against the building owner for damage caused to the trade of the former through the exercise by the latter of the rights given to him by the before-mentioned sub-section.

Judgment of a Divisional Court, reported, [1906] 2 K. B. 767, affirmed. ADAMS *v.* MARYLEBONE BOROUGH COUNCIL - - **C. A. 822**

4. —— *Poor Rate — Valuation — Flats — Houses and Buildings let out in Separate Tenements—Rateable Value—Deductions from Gross Value—Valuation* (*Metropolis*) *Act*, 1869 (32 *&* 33 *Vict. c.* 67), *Sched. III.*

By s. 52 of the Valuation (Metropolis) Act, 1869, it is enacted that in calculating the rateable value of hereditaments for the purposes of the Act the percentage or rate of deductions to be made from the gross value shall not exceed the amounts in the Third Schedule to the Act.

The Third Schedule, which shews the several classes into which the hereditaments inserted in a valuation list are to be divided, contains in a foot-note a provision to the effect that the maximum rate of deductions prescribed therein shall not apply to houses or buildings let out in separate tenements, but that the rate of

LONDON—*continued.*
deductions in such cases shall be determined in each case according to the circumstances and the general principles of law.

The appellant was the owner and occupier of a building in the metropolis consisting of two shops on the ground floor, a flat on the first floor extending over both the shops, and two similar flats on the second and third floors. Each shop consisted of one room with a yard and small offices in the rear, and a basement. Each flat consisted of a suite of rooms reached by a common staircase approached from the street by a passage at the side of one of the shops. Each flat had its own outer door opening on to the staircase. The passage way had a door opening on to the street. The two shops and three flats were five separate rateable hereditaments :—

Held, that the building was a "house or building let out in separate tenements" within the meaning of the foot-note to the Third Schedule to the Act, notwithstanding that the shops and flats were separate rateable hereditaments ; and that, therefore, in arriving at the rateable values of the shops and flats, the assessment committee might allow deductions from the gross values at a rate greater than the maximum rate of deductions specified in the Third Schedule. WESTERN *v.* KENSINGTON ASSESSMENT COMMITTEE - - - - - - **Div. Ct. 323**

—— Poor rate, Statutory exemption from liability to—Insertion of rateable value of excepted premises—Mandamus **764**
See RATES. 1.

LUGGAGE—Railway company—Passenger's luggage carried free of charge—Liability for loss - - - - - - **499**
See CARRIER.

LUNACY—Pauper lunatic—Maintenance—Order against husband—Liability of son to contribute - - - - - - **301**
See POOR LAW. 1.

MAINTENANCE—Poor law.
See under POOR LAW.

MAINTENANCE OF SUIT—*Charity induced by Religious Sympathy—Common Interest.*

Although there is an inducement based on a common religious belief which leads a rich person out of charity to assist a poor one in defending a suit, the assistance given is none the less charitable, and the case falls within the specific exception from the law against maintenance established by the authorities founded on the interest arising out of charity. HOLDEN *v.* THOMPSON - - - - - **Div. Ct. 489**

MALICE — Libel — Interrogatory — Practice — Defence — Fair comment — Express malice - - - - - - - **626**
See DISCOVERY.

MANDAMUS—Poor rate—Statutory exemption from liability to poor rate—Mandamus to assessment committee - - **764**
See RATES. 1.

MARINE INSURANCE.
See under INSURANCE, MARINE.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MERCANTILE AGENT—Possession of goods—Consent of owner—Larceny by a trick
See FACTOR. **50**

METROPOLIS.
See under LONDON.

MILK—Written warranty—Evidence in writing to connect particular consignment with warranty - - - - - - - **80**
See ADULTERATION.

MINE—Land tax, Redemption of—Liability to assessment of coal mines under redeemed lands - - - - - **446**
See REVENUE. 5.

MONEY-LENDERS—Proof of debt by money-lender—Withdrawal of proof—Jurisdiction of Bankruptcy Court to grant relief - - - - - - - **868**
See BANKRUPTCY. 8.

MORTGAGE—Bankruptcy—Solicitor and client—Cash accounts—Draft bills of costs—Proof by solicitor—Trustee's right to go behind mortgage and settled account
See BANKRUPTCY. 9. **23**

MOTOR CAR—*Conviction for driving at excessive Speed—Indorsement on Licence—First or Second Offence—Parks Regulation Act*, 1872 (35 *&* 36 *Vict. c.* 15)—*Rules* 3 *&* 4 *of the Rules made by the Commissioners of Works and Public Buildings—Locomotives—Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 4.

Where the driver of a motor car is convicted of a first or second offence of exceeding a speed limit fixed in a lawful way other than under the Motor Car Act, 1903, e.g., under rules made by the Commissioners of Works and Public Buildings in connection with the regulations prescribed by the Parks Regulation Act, 1872, the Court before whom the conviction takes place has no power under s. 4 of the Act of 1903 to indorse on the convicted person's licence particulars of the conviction. REX *v.* MARSHAM. *Ex parte* CHAMBERLAIN - - - - **Div. Ct. 638**

—— Water for motor car used for profession of physician and surgeon — Supply for domestic purposes - - - **611**
See WATER. 2.

NEGLIGENCE—Dangerous employment—Infant—Duty to instruct—Delegation of duty—Foreman - - - - **548, 646**
See EMPLOYER AND WORKMAN. 8, 9.

—— Liability of landlord for injury happening to stranger during tenancy—Repairs—Nuisance - - - - - - **141**
See LANDLORD AND TENANT. 3.

—— Pawnbroker—Pledge—Neglect to deliver to pledgor—Reasonable excuse—Loss of pledge - - - - - - **685**
See PAWNBROKER. 2.

NEGOTIABLE INSTRUMENT—*Promissory Note—Signature in Blank—Delivery to Agent for safe Custody—Fraudulent Negotiation of Note*

NEGOTIABLE INSTRUMENT—*continued.*
by Agent—Rights of Bona Fide Indorsee for Value.

The defendant in South Africa, being about to leave for England, gave to two persons a power of attorney to act for him in his absence. He further, in anticipation of the possibility of funds being suddenly required during his absence, signed his name on two blank unstamped pieces of paper, which were lithographed forms of promissory notes, and handed them to one of the two agents with instructions that they should be retained in the custody of his attorney until the defendant should, by telegram or letter from England, give instructions for their issue as promissory notes and as to the amounts for which they should be filled up. After the defendant had left South Africa, the attorney to whom he had handed the documents, without waiting for instructions from the defendant (which were in fact never given), and in fraud of the defendant, filled in the blanks in the documents so as to make them appear to be promissory notes for considerable sums and sold them to the plaintiff, who took them honestly and in good faith, and without notice of the fraud, and gave full value for them. For the purpose of suing upon them in England the notes were stamped as foreign bills :—

Held that, as the defendant handed the notes to his agent as custodian only, and not with the intention that they should be issued as negotiable instruments, he was not estopped from denying the validity of the notes as between himself and the plaintiff, and that the action was not maintainable.

Lloyd's Bank, Ld. v. *Cooke*, [1907] 1 K. B. 794, distinguished. SMITH *v.* PROSSER
C. A. 735

NOTICE — Insurance, Accident — Condition in policy—Immediate notice of accident —Omission to give notice—Insurer's liability - - - - - - **798**
See INSURANCE, ACCIDENT.

NUISANCE—Liability of landlord for injury happening to stranger during tenancy —Repairs—Negligence - - **141**
See LANDLORD AND TENANT. 3.

OFFENCES AGAINST THE PERSON ACT — Summary jurisdiction - - - **296**
See CRIMINAL LAW. 2.

"OFFICE"—Loss of office — Compensation — "Place, situation, or employment" **617**
See COMPENSATION.

"OWNER"—Private street works—Provisional apportionment — Lands extra commercium - - - - - - - **130**
See STREETS. 3.

PARKS REGULATION—Motor car—Conviction for driving at excessive speed—Indorsement on licence — First or second offence - - - - - - **638**
See MOTOR CAR.

PARLIAMENT — *Franchise — Dwelling-house— "Inhabitant Occupier" or "Lodger"—Resident Landlord—Prima facie Proof of Ground of Objection—Rebutting Evidence—Representation of the People Act*, 1867 (30 *&* 31 *Vict. c.* 102), *s.* 3, *sub-s.* 2 ; *s.* 4—*Parliamentary and Municipal Registration Act*, 1878 (41 *&* 42 *Vict. c.* 26), *s.* 5 ; *s.* 28, *sub-ss.* 10, 11.

At a court held by a revising barrister the appellant claimed to be entitled to the franchise of an "inhabitant occupier" of a dwelling-house under s. 3, sub-s. 2, of the Representation of the People Act, 1867, and s. 5 of the Parliamentary and Municipal Registration Act, 1878, notwithstanding a notice of objection that the appellant was not an inhabitant occupier, but a lodger.

The revising barrister found—

(1.) That the house, part of which was alleged to be separately occupied as a dwelling, was itself a house of the description popularly known as an ordinary dwelling-house.

(2.) That the immediate landlord to whom the person in question paid rent resided in the house.

(3.) That such landlord was rated for the entire house as a separate tenement :—

Held, that these facts constituted evidence upon which the revising barrister could decide that there was prima facie proof of the ground of objection within s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878.

In order to rebut the prima facie proof of the ground of objection the appellant produced a document signed by himself and his landlord containing (inter alia) a statement to the effect that the landlord had no control over the appellant's rooms ; but the revising barrister did not accept the statements in the document as facts, and held that the document was not sufficient to rebut such prima facie proof :—

Held, that it was competent to the revising barrister to come to that conclusion.

Decision of Divisional Court, [1907] 1 K. B. 126, affirmed. DOUGLAS *v.* SMITH - **C. A. 568**

PAROCHIAL ASSESSMENT ACT.
See under RATES.

PARTNERSHIP—Auctioneer—Bill of exchange Implied authority to accept—Trader
See AUCTIONEER. **684**

PARTY WALL—London — Compensation for damage to trade — Jurisdiction of surveyors - - - - - - **822**
See LONDON. 3.

PASSENGER—Railway company — Passenger's luggage carried free of charge—Liability for loss - - - - - - **499**
See CARRIER.

PAWNBROKER—*Illegal Pawning—Restitution on Terms—Magistrates' Order—Civil Remedy —Pawnbrokers Act*, 1872 (35 *&* 36 *Vict. c.* 93), *s.* 30.

An agent of the plaintiffs having been convicted by a Court of summary jurisdiction of larceny as a bailee in respect of certain goods of the plaintiffs which he had pawned with the defendant, a pawnbroker, the Court made an order under s. 30, sub-s. 2, of the Pawnbrokers

PAWNBROKER—*continued.*

Act, 1872, on the application of the police officer in charge of the case, which application the plaintiffs' representative, though present, neither supported nor opposed, for the return of the goods on payment by the plaintiffs of the amount of the loan. The plaintiffs did not comply with the order, and subsequently sued the defendant in the county court for the return of the goods and obtained judgment :—

Held, that the judgment was right. LEICESTER & Co. *v.* CHERRYMAN - **Div. Ct. 101**

2. —— *Pledge—Neglect to deliver to Pledgor—Reasonable Excuse—Loss of Pledge—Pawnbrokers Act*, 1872 (35 *&* 36 *Vict. c.* 93), *s.* 31.

Where a pawnbroker has lost an article pledged to him, and is therefore not in possession of it at the time the person entitled to have delivery seeks to redeem it, the loss of the article constitutes, in the absence of dishonesty, a reasonable cause within the meaning of s. 31 of the Pawnbrokers Act, 1872, for neglecting to deliver the pledge to the person entitled to have delivery thereof. The pawnbroker is therefore not liable to be convicted of an offence under that section. ALLWORTHY & WALKER *v.* CLAYTON - - - - - - **Div. Ct. 685**

PAYMENT — Solicitor — Undertaking to pay money to person not client — Disciplinary jurisdiction of Court—Summary order for payment - - **539**
See SOLICITOR. 2.

PAYMENT INTO COURT—Lump sum—Joinder of several causes of action - - **290**
See PRACTICE. 4.

PENAL INTEREST—Whether payable to bankrupt's estate or to the Treasury - **36**
See BANKRUPTCY. 5.

PENSION — Police constable—Jurisdiction of High Court—Case stated from quarter sessions - - - - - **591**
See JUSTICES. 2.

PHYSICIAN—Water for motor car used for profession of physician and surgeon—Supply for domestic purposes - **611**
See WATER. 2.

PISTOLS—*Air-gun— Toy or Weapon—Sale by Retail—Pistols Act*, 1903 (3 *Edw.* 7, *c.* 18), *ss.* 2, 3.

The Pistols Act, 1903, does not apply to a mere toy, but it does apply to an air-gun if it is a weapon from which a shot, bullet, or other missile can be discharged, although it is not a firearm. BRYSON *v.* GAMAGE, LD. **Div. Ct. 630**

PLEDGE—Pawnbroker—Neglect to deliver to pledgor—Reasonable excuse—Loss of pledge - - - - - - **685**
See PAWNBROKER. 2.

POLICE—Pension of police constable—Jurisdiction of High Court—Case stated from quarter sessions - - - - **591**
See JUSTICES. 2.

POLICY—Insurance.
See under INSURANCE, ACCIDENT, INSURANCE, LIFE, and INSURANCE, MARINE.

POOR LAW—*Lunatic, Pauper — Maintenance —Order against Husband — Liability of Son to contribute—Poor Relief Act*, 1601 (43 *Eliz. c.* 2), *s.* 7—*Poor Law Amendment Act*, 1850 (13 *&* 14 *Vict. c.* 101), *s.* 5.

The fact that an order has been made against the husband of a pauper lunatic, under s. 5 of the Poor Law Amendment Act, 1850, to pay a weekly sum to the guardians towards the cost of the wife's maintenance in an asylum does not exempt the son of the pauper lunatic from liability under 43 Eliz. c. 2, s. 7, to contribute towards her maintenance. COLE *v.* BROWN **Div. Ct. 301**

2. —— *Settlement—Division of Parish—Part of Parish added to other Parish by Order of County Council — Confirmation of Order by Local Government Board—Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 57, 59 ; *Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *ss.* 36, 42.

By s. 42 of the Local Government Act, 1894, "When an order under s. 57 of the Local Government Act, 1888, has been confirmed by the Local Government Board, such order shall at the expiration of six months from that confirmation be presumed to have been duly made, and to be within the powers of that section, and no objections to the legality thereof shall be entertained in any legal proceeding whatever." By s. 36, sub-s. 10, of the Local Government Act, 1894, an order made by a county council in pursuance of Part III. of that Act is to be deemed to be an order under s. 57 of the Act of 1888.

A joint committee of a county council and of the council of a county borough made an order with regard to a parish which, at the passing of the Local Government Act, 1894, was situate in more than one urban district, which order, in providing for the union of part of the parish with another parish and the constitution of the remaining part into a separate parish, further provided that the alteration of the parish should not have the effect of destroying settlements already acquired therein prior to the coming into operation of the order :—

Held that, whether the order was made under the Local Government Act, 1888, or the Local Government Act, 1894, and whether or not there was originally jurisdiction to insert in the order the provision dealing with pauper settlements, s. 42 of the Local Government Act, 1894, applied, and no objection to the legality of the order could be entertained, more than six months having elapsed since its confirmation by the Local Government Board.

Decision of the Divisional Court, [1906] 2 K. B. 365, affirmed. REX *v.* MIDDLESEX JUSTICES. *Ex parte* WALSALL UNION **C. A. 581**

—— Auditor—Certiorari—Right of Court to review surcharge - - - **878**
See LOCAL GOVERNMENT. 1.

POOR RATE.
See under RATES.

POULTRY—Straying on highway—Damage to passenger — Liability of owner — Remoteness - - - - - **345**
See TRESPASS.

PRACTICE—*Costs, Security for—Appeal to King's Bench Division from Official Referee—Inherent Jurisdiction of High Court.*

On an appeal from an official referee the King's Bench Division has an inherent jurisdiction to order the appellant to give security for costs. J. H. BILLINGTON, LD. *v.* BILLINGTON
Div. Ct. 106

2. —— *Discovery—Interrogatories—Admissibility — Action for Seduction — Disclosure of Names—Rules of Supreme Court, Order* XXXI., *r.* 1.

In an action for the seduction of the plaintiff's daughter, where the defendant admitted carnal knowledge but traversed the allegation that he was the father of the daughter's child, an interrogatory whether the defendant alleged that carnal knowledge had taken place between the daughter and any other male person, and, if so, asking for the name and address of such person, is not allowable as tending to call for the names of witnesses whom the defendant may desire to call, or the particular facts on which he means to rely, in support of his defence. HOOTON *v.* DALBY - - - - **C. A. 18**

3. —— *Joinder of Causes of Action—Leave of Court or Judge—Leave given after Issue of Writ—Waiver of Objection by Defendant—Rules of Supreme Court, Order* XVIII., *r.* 2; *Order* LXX., *rr.* 1, 2.

Leave to join another cause of action with an action for the recovery of land may be given by the Court or a judge after issue of the writ in which the causes of action have been improperly joined. Such a joinder is an irregularity only, and an objection to the writ on that ground is capable of being waived by the defendants.

In re Pilcher, Pilcher v. *Hinds*, (1879) 11 Ch. D. 905, and *Smurthwaite* v. *Hannay*, [1894] A. C. 494, considered. LLOYD *v.* GREAT WESTERN DAIRIES CO. - - - - **C. A. 727**

4. —— *Joinder of several Causes of Action—Payment of Lump Sum into Court—Rules of Supreme Court, Order* XVI., *r.* 1; *Order* XXII., *r.* 2.

Order XXII., r. 2, of the Rules of the Supreme Court provides that payment into court shall be signified in the defence, and that the claim or cause of action in satisfaction of which the payment is made shall be specified therein.

In an action constituted under Order XVI., r. 1, brought by a number of plaintiffs severally claiming relief in respect of the same transaction, the defendants paid a lump sum into court, saying in their defence that the amount paid into court was sufficient to satisfy the plaintiffs' claims, but without further specifying the claims or causes of action in satisfaction of which the payment was made:—

Held, that the payment into court was a good payment, and that if the plaintiffs were embarrassed by it their proper course was to

PRACTICE—*continued.*

apply by summons for particulars of the payment. BENNING *v.* ILFORD GAS CO.
Div. Ct. 290

5. —— *Special Case—Application for Service on Justices — Practice—Summary Jurisdiction Rules*, 1886, *r.* 18.

Where an application is made under s. 33 of the Summary Jurisdiction Act, 1879, to a Court of summary jurisdiction to state a special case, it is a sufficient compliance with the rule dated March 20, 1906, made in substitution of r. 18 of the Summary Jurisdiction Rules, 1886, if the previous practice of serving a copy of the application on each justice personally is followed instead of leaving the justices' copies with the clerk of the Court. THE KING *v.* WOODCOCK
Div. Ct. 104

—— Discovery.
See under DISCOVERY.

—— Judicial separation—Permanent alimony—Order of Probate and Divorce Division—Arrears—Action to recover - **13**
See HUSBAND AND WIFE.

—— Service on justices, Application for—Special case—Summary jurisdiction - **104**
See PRACTICE. 5.

—— Writ of execution—Time of application for writ—Sale of goods - - - **333**
See COUNTY COURT.

PREMIUMS—Recovery back of—Fraud of insurance agent—Avoidance of policy **242**
See INSURANCE, LIFE.

PRINCIPAL AND AGENT—Licensing Acts—Sale by licensed agent on behalf of unlicensed principal - - - **237**
See LICENSING ACTS. 3.

—— Life insurance—Fraud of insurance agent—Avoidance of policy—Recovery back of premiums - - - - **242**
See INSURANCE, LIFE.

—— Mercantile agent—Possession of goods—Consent of owner—Larceny by a trick
See FACTOR. **50**

—— Promissory note—Signature in blank—Fraudulent negotiation of note by agent—Rights of bona fide indorsee for value - - - - - - **735**
See NEGOTIABLE INSTRUMENT.

PRIORITY—Execution—Building agreement—Plant on premises—Lien of building owner—Seizure by sheriff - - **522**
See SHERIFF. 2.

PRIVATE STREETS.
See under STREETS.

PRIVIES.
See under WATER-CLOSETS.

PROMISSORY NOTE — Signature in blank — Fraudulent negotiation of note by agent—Rights of bona fide indorsee for value **735**
See NEGOTIABLE INSTRUMENT.

PROOF—Assignee of creditor, Proof by—Costs due by creditor to trustee—Dividend on proof — Trustee's right to retain dividend against costs - - - 899
See BANKRUPTCY. 7.

—— Bankruptcy — Solicitor and client — Cash accounts—Draft bills of costs—Right to require particulars and vouchers 23
See BANKRUPTCY. 9.

—— Money-lender, Proof of debt by—Withdrawal of proof—Jurisdiction of Bankruptcy Court to grant relief - 868
See BANKRUPTCY. 8.

PUBLIC HEALTH—Auditor—Certiorari—Right of Court to review surcharge - 878
See LOCAL GOVERNMENT. 1.

—— Information—Execution of work in contravention of by-law — Continuing offence - - - - - - 273
See LOCAL GOVERNMENT. 2.

—— Rates—"Land used only as a railway" 256
See RATES. 2.

—— Sewer passing through private ground—Drain—Right to connect - - 390
See SEWERS.

—— Slaughter-house — Licence — Condition — Limitation of time - - - 396
See SLAUGHTER-HOUSE. 1.

—— Streets.
See under STREETS.

PUBLISHER—Author and—Sale of copyright to publisher on royalties—Bankruptcy of publisher—Trustee carrying on business - - - - - - - 33
See BANKRUPTCY. 1.

QUARTER SESSIONS—Pension of police constable—Jurisdiction of High Court—Case stated from quarter sessions - 591
See JUSTICES. 2.

—— Right of appeal to quarter sessions—Private street works - - - - - 96
See STREETS. 2.

QUAY—Workmen's Compensation Act—Ship moored alongside a quay—"Undertakers" - - - - - 409, 420
See EMPLOYER AND WORKMAN. 5, 6.

RAILWAY — *Contract of Carriage — Conveyance of Merchandise by Passenger Train—Absence of Obligation to carry—Special Contract not in Writing—Liability for Loss—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7.

Sect. 7 of the Railway and Canal Traffic Act, 1854, is applicable to a case where a railway company, though under no obligation to carry certain goods, has, nevertheless, made a contract for their carriage.

The defendant company by its timetables offered to allow commercial travellers to take with them by passenger train, free of charge, a certain amount of luggage, which was not ordinary passenger's luggage, "on the condition that the company is relieved from all liability for loss, damage, misdelivery, or delay." The plaintiffs, who were commercial travellers, in pursuance of this offer, but without signing any special contract to that effect, took with them on a journey by the defendant company's line a case of samples, which was lost on the journey by the negligence of the company's servants:—

Held (affirming the judgment of Kennedy and Bray JJ., [1906] 2 K. B. 619), that, as no special contract had been signed by the plaintiffs, the provisions of s. 7 of the Railway and Canal Traffic Act, 1854, applied, and, the condition being thereby made null and void, the defendant company were liable for the loss of the samples. WILKINSON *v.* LANCASHIRE AND YORKSHIRE RY. CO. - - - **C. A. 222**

RAILWAY—*continued.*

2. —— *Rates—Short Distance—Merchandise "conveyed" by the Company partly on its own Railway and partly on another Railway.*

By clause 11 of the Schedule to the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), "Where merchandise is conveyed for an entire distance which does not exceed . . . . in the case of merchandise in respect of which no station terminal is chargeable six miles, the company may . . . . make the charges for conveyance authorized by this schedule as for . . . . six miles . . . . : Provided that where merchandise is conveyed by the company partly on the railway and partly on the railway of any other company the railway and the railway of such other company shall, for the purpose of reckoning such short distance, be considered as one railway."

The London and North Western Railway Company accepted goods for conveyance for an entire distance partly on their own railway and partly on the railway of the Lancashire and Yorkshire Railway Company; in one instance the entire distance was less than six miles, in another instance the distance conveyed over the London and North Western line was more than, and over the Lancashire and Yorkshire line was less than, six miles. In both instances the traffic was taken by the engines of the respective companies over their own lines, except that, for convenience of working, the engine of the Lancashire and Yorkshire Company picked up the traffic at a siding on the London and North Western line about two miles short of the junction of the two railways and conveyed it thence to its destination:—

Held by Vaughan Williams L.J. and Fletcher Moulton L.J. (Buckley L.J. in part dissenting), that the proviso only applied where the total transit was less than six miles and there was a conveyance or carriage by the London and North Western Railway Company over both the railways, and there had not been such a conveyance by that company merely because they had received the traffic to be carried to its destination at a through rate. In the first instance, therefore, the London and North Western Company were entitled to charge two short distance rates, and in the second to charge a mileage rate over their own line and a short

RAILWAY—*continued.*

distance rate over the line of the Lancashire and Yorkshire Company.

The expression "conveyed" in the proviso does not refer merely to the physical haulage of the traffic.

Decision of the Railway and Canal Commission, [1906] 1 K. B. 577, affirmed on different grounds. LANCASHIRE AND CHESHIRE COAL ASSOCIATION *v.* LONDON AND NORTH WESTERN RY. CO. AND LANCASHIRE AND YORKSHIRE RY. CO. - - - **C. A. 902**

3. —— *Regulation — Increase of Rates— Reasonableness—Onus of Proof—Railway and Canal Traffic Act*, 1894 (57 *&* 58 *Vict. c.* 54), *s.* 1.

By s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1894, it is enacted that where a railway company have since December 31, 1892, increased, or thereafter increase, any rate, then, if any complaint is made that the rate is unreasonable, it shall lie on the company to prove that the increase of the rate is reasonable.

A railway company after January 1, 1893, made a reduction in a rate then in force, and subsequently increased it as from August 1, 1900, but the rate was after the increase no higher than it had been on December 31, 1892 :—

Held, by Cozens-Hardy M.R. and Fletcher Moulton L.J. (Kennedy L.J. dissenting), that the railway company had increased the rate since December 31, 1892, within the meaning the above section.

Decision of the Court of the Railway and Canal Commission reversed. NORTH STAFFORDSHIRE COLLIERY OWNERS' ASSOCIATION *v.* NORTH STAFFORDSHIRE RY. CO., LONDON AND NORTH WESTERN RY. CO., GREAT WESTERN RY. CO., AND SHROPSHIRE UNION RAILWAYS AND CANAL CO. - - - - **C. A. 191**

4. —— *Regulation — Provisional Order — Demurrage of Trucks — Right of Action for Damages for Detention — Jurisdiction — Great Western Railway Company (Rates and Charges) Provisional Order Confirmation Act*, 1891 (54 *&* 55 *Vict. c. ccxxii.*), *s.* 6.

A railway Act confirming a provisional order, after providing that when merchandise is conveyed in trucks not belonging to the company the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period, enacted that "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party" :—

Held by Vaughan Williams and Buckley L.JJ. (Fletcher Moulton L.J. dissenting), that a claim by a trader for damages sustained by him in hiring a truck in the place of one delayed by the railway company was not in respect of a "difference arising under this section," and might therefore be enforced by action in a Court of law.

Decision of the Divisional Court, [1906] 2 K. B. 426, affirmed. REX *v.* MARYLEBONE COUNTY COURT JUDGE AND THE GREAT WESTERN RY. CO. *Ex parte* PHILLIPS & CO. **C. A. 664**

RAILWAY—*continued.*

—— Carriage licence—Cars on light railway *See* REVENUE. 1. **991**

—— Passenger's luggage carried free of charge —Articles over value of 10*l.*—Liability for loss - - - - - **499** *See* CARRIER.

—— Rates—"Land used only as a railway— Light railway - - - - **256** *See* RATES. 2.

—— Water, Cutting off—Non-payment of rate *See* WATER. 1. **578**

RATES — *Poor Rate — Valuation List — Rateable Value — Statutory Exemption from Liability to Poor Rate—Insertion of Rateable Value of exempted Premises — Mandamus to Assessment Committee*—7 *Geo.* 3, *c.* 37, *s.* 51—*Valuation* (*Metropolis*) *Act*, 1869 (32 *&* 33 *Vict. c.* 67).

By a reclamation Act of 1766 certain land then forming part of the bed of the river Thames was authorized to be inclosed and embanked by the owners of adjoining wharves and land, and the land so inclosed and embanked was to vest in them "free from all taxes and assessments whatsoever," an exemption which in *Sion College* v. *London Corporation*, [1901] 1 K. B. 617, was held to be limited to the poor rate and not to extend to the consolidated rate. In preparing the quinquennial valuation list for a parish in which certain of the exempted premises were situate, the overseers inserted their gross values in the appropriate column, but in the column for rateable valne they inserted merely the word "exempt" without any figure of value ; the list so prepared was adopted by the assessment committee. The Corporation of London, who as a rating authority were interested in the preparation of the valuation list as the basis for the consolidated rate, applied for a writ of mandamus to compel the assessment committee to insert the rateable values of the various properties in the appropriate column in the valuation list :—

Held (reversing the decision of a Divisional Court), that, assuming there was a duty in the assessment committee to insert the rateable values of the exempted properties in the valuation list, the Corporation as a rating authority had a right of appeal to quarter sessions under s. 32 of the Valuation (Metropolis) Act, 1869, and, having an alternative and effective remedy, were not entitled to a mandamus ; and, further, that, even if the Corporation had no statutory right of appeal under that section, the safeguards provided by that Act as a whole were amply sufficient to protect the interest of all parties interested, and the Court ought not, by granting a mandamus, to insert further safeguards in the Act.

Per Vaughan Williams and Fletcher Moulton L.JJ. : It was the duty of the assessment committee to insert both the gross and rateable values of the exempted properties in the valuation list. THE KING *v.* CITY OF LONDON ASSESSMENT COMMITTEE - - **C. A. 764**

2. —— *Railway—General District Rate— Assessment—"Land used only as a Railway"— Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55),

RAILWAY—*continued.*

s. 211, *sub-s.* 1 (*b*)—*Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48), *s.* 12, *sub-s.* 2.

A company were the owners of a light railway constructed under an Order made under the Light Railways Act, 1896. The railway, which physically resembled a tramway, was laid along certain open streets, and the Order, while preserving to the public their ordinary right of passage over the highway, provided that the company should have the exclusive use of the railway for carriages with flange wheels. The company having been assessed to the general district rate in respect of their occupation of the railway :—

Held, upon the construction of s. 12, sub-s. 2, of the Light Railways Act, 1896, that s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, applied to light railways; and that, notwithstanding the user by the public of the surface of the streets in exercise of their right of passage, the company were occupiers of land used only as a railway constructed under the powers of an Act of Parliament for public conveyance within the meaning of s. 211 and were consequently entitled to be assessed to the general district rate in respect of the said railway at one-fourth only of its net annual value.

Decision of Divisional Court, [1906] 2 K. B. 140, affirmed. WAKEFIELD AND DISTRICT LIGHT RAILWAYS CO. *v.* WAKEFIELD CORPORATION - - - - - - **C. A. 256**

3. —— *Sea—Necessary Expense to command Rent—Rent-charges imposed for Protection of Land from the Sea—Poor Rate—Rateable Value—Parochial Assessment Act*, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

In a district under the jurisdiction of commissioners of sewers rent-charges were imposed on certain lands for the maintenance of works necessary to protect the district from incursions of the sea. The rent-charges were imposed on some only of the lands in the district, though other lands were equally benefited by the protection works :—

Held (Vaughan Williams L.J. dissenting), that in arriving at the rateable value of the hereditaments which were subject to the burden of the rent-charges, the amount of those rent-charges could not be deducted as an expense necessary to maintain the property in a state to command the rent thereof within s. 1 of the Parochial Assessment Act, 1836.

Whether any other sum ought to be allowed by way of deduction, *quære*.

Reg. v. *Vange*, (1842) 3 Q. B. 242, followed.

Decision of Divisional Court, [1906] 2 K. B. 147, affirmed. NEWPORT UNION *v.* STEAD. NEWPORT UNION *v.* GREEN - **C. A. 460**

—— Poor rate—Valuation—Flats - - **323**
See LONDON. 4.

—— Railway—"Land used only as a railway"—Light railway - - - - - **256**
See RATES. 2.

—— Railway—Regulation—Increase of rates—Reasonableness—Onus of proof - **191**
See RAILWAY. 3.

RAILWAY—*continued.*

—— Railway rates—Short distance—Merchandise "conveyed" by the company partly on its own railway and partly on another railway - - - - - - **902**
See RAILWAY. 2.

—— Water, Cutting off—Non payment of rate
See WATER. **578**

REGISTRATION—Deed of arrangement—Non-registration—Validity - - **170**
See BANKRUPTCY. 4.

REMOTENESS—Fowls straying on highway—Damage to passenger — Liability of owner - - - - - - - **345**
See TRESPASS.

RENEWAL—Licence.
See under LICENSING ACTS.

RENT—Lease—Forfeiture for non-payment of rent—Underlessee—"Tenant"—Relief against forfeiture - - - **8**
See LANDLORD AND TENANT. 2.

RENT-CHARGES — Poor-rate — Necessary expenses to command rent—Rent-charges imposed for protection of land from the sea - - - - - - - **460**
See RATES. 3.

REPAIRS—Extraordinary traffic—Repair of highway — Recovery of expenses — Limitation of time for bringing action
See HIGHWAY. 3. **39**

—— Highway—Limitation of time for bringing action—"Extraordinary traffic" - **516**
See HIGHWAY. 2.

—— Liability of landlord for injury happening to stranger during tenancy—Repairs—Negligence—Nuisance - - - **141**
See LANDLORD AND TENANT. 3.

REPRESENTATION OF THE PEOPLE ACT.
See under PARLIAMENT.

RESERVE—Auctioneer — Personal liability — Sale subject to reserve—Lot knocked down at less than reserve - - **1**
See AUCTIONEER. 2.

REVENUE—*Carriage Licence—Cars on Light Railway—Light Railways Act*, 1896 (59 & 60 *Vict. c.* 48)—*Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 4.

A light railway constructed under an order made under the Light Railways Act, 1896, is a "railway" within the meaning of s. 4 of the Customs and Inland Revenue Act, 1888, which exempts from the licence duty on "carriages" thereby imposed any carriage drawn or propelled upon a railway by steam or electricity or other mechanical power. ATTORNEY-GENERAL *v.* YORKSHIRE (WOOLLEN DISTRICT) ELECTRIC TRAMWAYS, LD. - - - - **Bray J. 991**

2. —— *Estate Duty — Allowance — Incumbrances—Bona fide Creation—Consideration—"Wholly for the Deceased's own Use and Benefit"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 7, *sub-s.* 1 (*a*).

By a deed of entail made in 1872 certain

REVENUE—*continued.*

estates in Scotland, of which the defendant's father was then heir of entail and in possession, were re-entailed, the order of succession after the defendant's father being first the defendant, then the defendant's son, and then certain other persons. In 1897 the defendant's father petitioned the Scotch Court of Session under the Scotch Entail Acts to approve of an instrument of disentail without the consent of the defendant or his son. Their interests were duly valued respectively at 415,000*l.* and 287,000*l.*, for which sums the defendant's father executed two bonds in their favour, and the Court made a decree on the petition approving an instrument of disentail, which was duly recorded and registered. By an assignation and deed of trust the defendant and his son assigned the sums secured by the bonds and the interest thereon to trustees to pay the income to the defendant for life and afterwards to his son. In 1898 the defendant's father made a revocable mortis causa disposition of the estates by which they were entailed after his death on the defendant, his son, and other persons. No interest was paid in money on the bonds by the defendant's father, but accounts were stated from time to time between the defendant and his father, in which the latter was debited with the amount due for interest on the bonds and credited with certain voluntary payments made by him to the defendant, shewing a balance due to the defendant, for which his father gave further bonds to the defendant amounting to 88,314*l.* The main motive of the defendant's father in thus dealing with the estates was to lessen the amount of estate duty payable on his death, but all the deeds and instruments, including the bonds, were genuine instruments intended to have their full operation without any reservation. The defendant's father died in 1903, and the defendant claimed to deduct from the capital value of the estates passing on the death, which amounted to 1,102,221*l.*, for the purpose of estate duty certain debts and incumbrances, including the bonds for 415,000*l.* and 287,000*l.* and 88,314*l.*, leaving an excess of debts and incumbrances over the value of the estates of 47,092*l.* :—

Held, that the bonds were incumbrances created bona fide for full consideration in money's worth wholly for the deceased's own use and benefit within s. 7, sub-s. 1 (*a*), of the Finance Act, 1894, and that the defendant was therefore entitled to make the deduction claimed. ATTORNEY-GENERAL *v.* DUKE OF RICHMOND, GORDON AND LENNOX (No. 1) - **Bray J. 923**

3. —— *Estate Duty—Grant by the Crown of Coal Duty—Tenement—Entailable Hereditament—Conversion of Coal Duty into Annuity—Redemption of Annuity—Purchase of Real Estate—Actual Tenant in Tail—Restraint on barring Entail*—30 *Geo.* 2 (*Private*), *c. x.*, *No.* 34—39 *Geo.* 3 (*Private*), *c. lxxxiv.*—39 *&* 40 *Geo.* 3 (*Public*), *c.* 43—39 *&* 40 *Geo.* 3 (*Local and Personal*), *c. ciii.*—1 *Vict.* (*Private*), *c. xxxiv.*—31 *&* 32 *Vict.* (*Private*), *c. iv.*—*Statute De Donis Conditionalibus* (*Westminster II.*, 13 *Edw.* 1, *c.* 1)—34 *&* 35 *Hen.* 8, *c.* 20—*Fines and Recoveries Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 74), *ss.* 15, 18—

REVENUE—*continued.*

Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 2, 5, *sub-s.* 5.

By letters patent King Charles II. granted to the first Duke of Richmond and the heirs of his body a certain coal duty, then vested in the Crown, of twelve pence per chaldron of sea coals, stone coals or pit coals, to be sold, shipped, carried, or vended, forth or out of the river or haven of Tyne, to hold the same unto and to the use of the said first Duke of Richmond and the heirs of his body, yielding and paying therefor yearly to His Majesty, his heirs and successors, the yearly rent of 1*l.* 6*s.* 8*d.*

By an Act of Parliament of 30 Geo. 2, after reciting that the third Duke of Richmond had become seised to him and the heirs of the body of the first Duke of Richmond in tail general of the said coal duty, and was desirous that the said coal duty should, in default of issue male of his own body, go to his brother and the heirs male of his body, and was also desirous of making a jointure in favour of his intended wife, but that the limitations in the grant of Charles II. could not be varied without the authority of Parliament, it was enacted that the third Duke of Richmond should be seised of the said coal duty unto and to the use of the third Duke of Richmond and the heirs male of his body, and that in default of heirs male of the body of the third Duke of Richmond the said coal duty should go unto and to the use of the brother of the third Duke of Richmond and the heirs male of his body, with a remainder to the heirs of the body of the first Duke of Richmond; and it was further enacted that it should be lawful for the third Duke of Richmond to limit the yearly sum of 3000*l.* payable out of the said coal duty to the use of his intended wife for her life to be in bar of all dower and thirds which she might thereafter claim out of the said coal duty.

By an Act of Parliament of 39 Geo. 3, after reciting that the ultimate reversion in the said coal duty was vested in the Crown, it was enacted that the Commissioners of the Treasury might on behalf of the Crown contract with the third Duke of Richmond for the purchase of the estate and interest of all persons in the said coal duty for an annuity payable out of the Consolidated Fund. By s. 2 of this Act the annuity was made payable to the third Duke of Richmond and the heirs male of his body, and, in default of heirs male of his body, to the brother of the third Duke of Richmond and the heirs male of his body, and, in default of heirs male of his body, then unto the heirs of the body of the first Duke of Richmond, and, in default of heirs of the body of the first Duke of Richmond, then it was enacted that the said coal duty should revert to the Crown; and it was enacted that the third Duke of Richmond and the heirs male of his body, and the brother of the third Duke of Richmond and the heirs male of his body, and the heirs of the body of the first Duke of Richmond should have the same power of disposition of the said annuity as they had in the said coal duty, and that the said annuity should go to such persons as would have been entitled to the said coal duty if the Act had not been made.

REVENUE—*continued.*

By an indenture dated August 19, 1799, and made in pursuance of this Act, the Commissioners of the Treasury contracted with the third Duke of Richmond for the purchase of all the interests in the said coal duty for an annuity of 19,000*l.* payable out of the Consolidated Fund to the persons entitled thereto according to the limitations declared in s. 2 of the Act. This indenture also contained provisions enabling the annuity to be redeemed by the purchase of 3 per cent. consolidated bank annuities in the names of the Lord High Treasurer or First Commissioner of the Treasury for the time being and certain other trustees, therein mentioned, with power to the person for the time being entitled to the annuity or dividends to appoint new trustees other than the Lord High Treasurer or First Commissioner of the Treasury. This indenture was subsequently confirmed by an Act of Parliament of 39 & 40 Geo. 3, c. 43.

By an Act of Parliament of 39 & 40 Geo. 3, c. ciii., the third Duke and any future Duke of Richmond were empowered to jointure a wife as therein provided, such jointure to be in bar of all dower; and the trustees were empowered to invest three-fourths of the annuities in the purchase of real estate to be conveyed to the use of such persons as the annuity of 19,000*l.* would have stood limited if the same had not been funded and redeemed; and it was provided that the person in possession of the premises should be liable for waste, and should have certain powers of leasing and exchange and a limited power of cutting timber.

Under the powers of this Act and of Acts of Parliament of 1 Vict. c. xxxiv., and 31 & 32 Vict. c. iv., the late Duke of Richmond became entitled to certain real estate at Goodwood, in the county of Sussex, which had been purchased and conveyed to the same uses to which the annuity of 19,000*l.* would have stood limited if the same had not been funded or redeemed, and subject to the provisions by the Act of 39 & 40 Geo. 3, c. ciii., declared:—

Held, (1.) that after, and probably before, the passing of the Act of 30 Geo. 2, the coal duty was a tenement within the meaning of the Statute De Donis Conditionalibus, and an entailable hereditament;

(2.) that the effect of the Acts of 39 Geo. 3 and 39 & 40 Geo. 3 was to substitute the annuity of 19,000*l.* for the coal duty;

(3.) that the late Duke of Richmond was actual tenant in tail of the Goodwood estates within the meaning of s. 15 of the Fines and Recoveries Act, 1833.

And, it having been admitted that the coal duty was not given as a recompense for any service rendered by the grantee to the Crown within the meaning of the statute 34 & 35 Hen. 8, c. 20:—

Held, (4.) that the Duke of Richmond was not by any other Act restrained from barring his estate within the meaning of s. 18 of the Fines and Recoveries Act, 1833, and, consequently,

(5.) that the late Duke of Richmond was competent to dispose of the Goodwood estates at the date of his death within the meaning of s. 2 of the Finance Act, 1894; and, therefore, that

REVENUE—*continued.*

on his death estate duty became payable on the principal value of those estates. ATTORNEY-GENERAL *v.* DUKE OF RICHMOND, GORDON AND LENNOX (No. 2) - - - **Bray J. 940**

4. —— *Income Tax—Office or Employment of Profit—Incumbent of Benefice—Profits accruing by reason of Office—Easter Offerings—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 146; *Sched. E, r.* 1.

Easter offerings given to the incumbent of a benefice as such for the purpose of augmenting his stipend are profits accruing to him by reason of his office, and he is therefore liable to pay income tax under Sched. E in respect of them.

Judgment of Bray J., [1907] 1 K. B. 336, reversed. COOPER *v.* BLAKISTON - **C. A. 688**

5. —— *Land Tax on Lands, Redemption of—Liability to Assessment of Coal Mines under redeemed Lands—Construction of Redemption Contract—Land Tax Act*, 1797 (38 *Geo.* 3, *c.* 5), *s.* 4.

In contracts for the redemption of land tax the word "lands" must be construed as having its natural meaning, including everything down to the centre of the earth, unless at the time of redemption there is in existence a separate and distinct hereditament liable to be separately assessed; and, if there is such a separate hereditament, all the circumstances of the case existing at the time of redemption must be looked at in order to see whether the intention of the registered certificate was that the surface only should be redeemed or the land and everything beneath it.

As coal and the profit to be derived from mining are nothing but the natural production and profit of the land, unopened seams of coal under land belonging to the same owner, in respect of which the land tax is redeemed, are included in the redemption. NEWTON, CHAMBERS & Co., LD. *v.* HALL - - **Bray J. 446**

6. —— *Stamp—Conveyance on Sale—Dissolution of Company and Reincorporation by same Act—Vesting of Property of Old Company in New—Finance Act*, 1895 (58 *&* 59 *Vict. c.* 16), *s.* 12.

By a special Act of Parliament a limited company was dissolved and reincorporated with additional powers, the property of the dissolved company being thereby vested in the new company, and the shareholders being given stock of the new company in substitution for the stock of the dissolved company theretofore held by them:—

Held, that the property of the dissolved company "vested by way of sale" in the new company within the meaning of s. 12 of the Finance Act, 1895, notwithstanding that there was no contract of sale between the two companies by reason of their never having been in existence at the same time. ATTORNEY-GENERAL *v.* FELIXSTOWE GAS LIGHT CO. - - **Bray J. 984**

7. —— *Succession Duty — Estate Duty — Property situate Abroad—English Will—Trust for Conversion—Liability to Duty.*

A testator, domiciled in England, by his will left the residue of his real and personal estate,

REVENUE—*continued.*

including a tea estate situate in Assam, to trustees in trust to convert it into money and invest the proceeds, and out of the income thereof to pay certain life annuities, and subject thereto and until the death of the last surviving annuitant to pay the surplus income to certain persons in equal shares and to the survivors or survivor of them. The will contained no gift over either of the income or of the corpus upon the death either of the last surviving annuitant or of the last surviving person entitled to the surplus income. The trustees were authorized by the will to work the tea estate until it was sold, and also to postpone the sale and conversion of any part of the estate as long as they might think it desirable, and it was thereby provided that in the meantime the annual produce of the unconverted part should be applied in the same manner as if it were income arising from the proceeds of conversion. The trustees were resident in England, and the will was proved in England. The trustees, in the exercise of their discretion, postponed the sale of the tea estate, and while it still remained unsold two of the persons entitled to shares of the surplus income died :—

Held, that the amount by which the survivors' shares of the surplus income was increased upon the deaths of the said two persons was not, even so far as that increase was attributable to the profits of the tea estate, property situate out of the United Kingdom, and that succession duty, estate duty, and settlement estate duty were payable in respect of the increase so attributable to the tea estate. ATTORNEY-GENERAL *v.* JOHNSON - - - - - **Bray J. 885**

REVIEW—Auditor—Certiorari—Right of Court to review surcharge - - - **878**
See LOCAL GOVERNMENT. 1.

RIOT — Persons riotously and tumultuously assembled — Building injured or destroyed—Damages - - - **853**
See CRIMINAL LAW. 1.

ROYALTIES—Author and publisher—Sale of copyright to publisher on royalties — Bankruptcy of publisher — Trustee carrying on business - - - **33**
See BANKRUPTCY. 1.

RULES OF SUPREME COURT :— **Order XVI. r. 1**—*Parties* - - - - **290**
See PRACTICE. 4.

—— **Order XVIII., r. 2** — *Joinder of Causes of Action* - - - - - **727**
See PRACTICE. 3.

—— **Order XXII., r. 2**—*Payment into and out of Court and Tender* - - - **290**
See PRACTICE. 4.

—— **Order XXXI., r. 1**—*Discovery and Inspection* - - - - - - **18**
See PRACTICE. 2.

—— **Order LXX., rr. 1, 2**—*Effect of Non-compliance* - - - - - **727**
See PRACTICE. 3.

SALE—Air-gun—Toy or weapon—Sale by retail **630**
See PISTOLS.

SALE—*continued.*

—— Auctioneer—Personal liability—Sale subject to reserve—Lot knocked down at less than reserve - - - **1**
See AUCTIONEER. 2.

—— Food and drugs.
See under ADULTERATION.

SALE OF GOODS— County court—Writ of execution—Time of application for writ
See COUNTY COURT. **333**

SCHOOLS—*Attendance at School—Ascension Day—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *ss.* 7, 74.

Ascension day is a "day exclusively set apart for religious observance by the religious body" known as the Church of England, within the meaning of ss. 7 and 74 of the Elementary Education Act, 1870. MARSHALL *v.* GRAHAM. BELL *v.* GRAHAM - - - **Div. Ct. 112**

2. —— *Expenses incurred by County Council in respect of Capital Expenditure—Provision of New Hot-water Apparatus and Earth-closets—Charge on Parish served by School—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 18, *sub-s.* (1) (*c*).

In s. 18, sub-s. 1 (*c*), of the Education Act, 1902, the words "capital expenditure" do not mean the expenditure of money taken from capital, but the expenditure of money which on its being laid out becomes capital irrespective of the source from which it is taken. THE KING *v.* WRAITH. *Ex parte* KENT COUNTY COUNCIL **Div. Ct. 756**

SEA—Poor rate—Necessary repairs to command rent—Rent-charge imposed for protection of land from the sea - - **460**
See RATES. 3.

SECURITY FOR COSTS — Appeal to King's Bench Division from official referee—Inherent jurisdiction of High Court
See PRACTICE. 1. **106**

SEDUCTION — Discovery—Interrogatories—Admissibility—Action for seduction—Disclosure of names - - - - **18**
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SEPARATION—Judicial separation—Permanent alimony—Order of Probate and Divorce Division—Arrears—Action to recover
See HUSBAND AND WIFE. **13**

SERVANT—Master and.
See under EMPLOYER AND WORKMAN.

SERVICE—Special case—Application for service on justices—Summary jurisdiction **104**
See PRACTICE. 5.

SET-OFF—Costs—Bankruptcy—Costs part of petitioning creditors' debts—Petition dismissed—Set-off of costs - - **896**
See BANKRUPTCY. 3.

SETTLEMENT (POOR LAW).
See under POOR LAW.

SEWERS — *Connecting Pipe — Local Government—Sewer passing through Private Ground—Drain—Right to Connect—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 21.

The plaintiff was the owner of a house and

SEWERS—*continued.*

garden adjoining a passage which was the property of the defendants. Beneath the surface of the passage was a pipe which, by reason of the fact that it received the drainage of more than one building was a sewer within the meaning of the Public Health Act, 1875. The plaintiff, for the purpose of draining his house, carried a pipe through his garden, and the local authority, at his request, placed a pipe in the soil of the passage to connect the plaintiff's drain with the sewer. The defendants removed the connecting pipe from the passage, and the plaintiff sued them for trespass in so doing:—

Held, that, although the plaintiff was entitled under s. 21 of the Public Health Act, 1875, to connect his drains with the sewers of the local authority, neither the plaintiff nor the local authority had any right to place the connecting pipe in the defendants' land, and that the action, therefore, failed. WOOD *v.* EALING TENANTS, LD. - - - - - - - **Div. Ct. 390**

SHEEP—Attacks on—Dog—"Dangerous"—Not kept under control—Evidence - **88**
See DOG.

SHERIFF—*Bankruptcy of Judgment Debtor—Execution under Writ of fi. fa.—Title of Execution Creditor to Money received by Judgment Debtor after entrance of Sheriff into Possession—Absence of overt act by Sheriff of Seizure of Money—Judgments Act*, 1838 (1 *& 2 Vict. c.* 110), *s.* 12.

Under a writ of fi. fa. issued against a judgment debtor the sheriff seized all the goods in his house. After the seizure by the sheriff the debtor received certain moneys, and while the sheriff was still in possession of his goods at his house, but without the sheriff's knowledge, deposited 395*l.* in bank-notes (the balance of the moneys so received by him after making certain payments) in a drawer in his bedroom at the house. Subsequently the debtor died, and an order was made under s. 125 of the Bankruptcy Act, 1883, for the administration of his estate. As he was unaware of its existence, the sheriff did no overt act of seizing and taking the 395*l.*:—

Held, that, if the 395*l.* had been in the debtor's house at the date of the seizure of his goods there by the sheriff, the effect of the sheriff's act on that date would have been to put him in the position of having seized and taken the money within the meaning of s. 12 of the Judgments Act, 1838; and that the overt act of the sheriff at the date of the seizure shewing an intention to seize and take all the goods in the house, coupled with the continuing intention to remain in possession of all goods answering that description, was enough to constitute a seizing and taking of goods not in the house at the date of the seizure but brought there before he withdrew from possession, and that the money was therefore not the property of the trustee under the administration order as against the execution creditor. JOHNSON *v.* PICKERING; NORTON, Claimant

Lawrence J. 437

2. —— *Execution—Building Agreement—Plant on Premises—Lien of Building Owner—Seizure by Sheriff—Priority.*

By a building agreement it was provided that if the builder should neglect to proceed with due diligence in the performance of the work the building owner should be at liberty to give notice in writing to the builder requiring him to proceed with the work with reasonable despatch, and that from the date of such notice the builder should not be at liberty to remove from the premises any plant belonging to him placed there for the purposes of the works, and that the building owner should have a lien upon such plant thenceforward until the notice was complied with.

A judgment having been recovered by a third person against the builder, the sheriff entered under a fi. fa., and seized in execution of the judgment certain plant belonging to the builder which had been brought by him to the premises for the purposes of the work. After the seizure by the sheriff, and while the plant was still on the premises and unsold, the building owner gave to the builder, who had not proceeded with due diligence in the performance of the works, notice under the contract to proceed therewith, and he thereupon claimed as against the execution creditor a lien on the plant:—

Held, that the intervening seizure by the sheriff prevented the building owner's right of lien under the notice from taking effect. BYFORD *v.* RUSSELL; MORRIS, Claimant - **Div. Ct. 522**

SHIPPING—*Charterparty—Lay Days—Exception of Sundays and Holidays—Loading done on Holidays by Mutual Consent—Implied Agreement—Despatch Money—Days saved in Loading.*

By a charterparty by which ships were chartered for the carriage of frozen meat from the River Plate to Liverpool or London, "seven weather working days (Sundays and holidays excepted)" were "to be allowed by owners to charterers for loading," and for any time beyond that period the charterers were to pay demurrage at the rate of 40*l.* per day; and "for each clear day saved in loading the charterers" were to "be paid or allowed by the owners the sum of 20*l.*" The work of loading a ship under this charterparty was continued during two holidays excepted by the charterparty, but there was no evidence of any express agreement under which the work was so carried on, or at whose suggestion this took place:—

Held, that an agreement between the parties ought to be inferred that the work of loading the ship should be carried on during those holidays on the terms that they should be reckoned as "working days" under the charterparty.

Where under the above-mentioned charterparty the loading of a ship was completed in a number of days less than that allowed by the charterparty as lay days:—

Held, that the charterers were not entitled to despatch money in respect of a subsequent Sunday or holiday included in the period of the lay days, the same not being a day "saved in loading" within the meaning of the charterparty.

So *held* by Vaughan Williams L.J. and

SHERIFF—*continued.*

Buckley L.J., Fletcher Moulton L.J. dissenting on both points.

Branckelow Steamship Co. v. *Lamport & Holt*, [1907] 1 K. B. 787, and *The Glenderon*, [1893] P. 269, approved of.

Appeal from the judgment of Channell J.; and appeal from the judgment of Bray J., [1907] 1 K. B. 788, dismissed. NELSON & SONS, LD. *v.* NELSON LINE, LIVERPOOL, LD. *In re* THE SAME - - - - - - - - **C. A. 705**

—— Alien— Undesirable — Expulsion order— Liability of master of ship bringing alien to the United Kingdom - **997**
See ALIEN.

—— Insurance, Marine.
See under INSURANCE, MARINE.

—— Warranty of freedom from capture—Capture of ship—Condemnation—Relation back of title of captors - - **248**
See INSURANCE, MARINE. 2.

—— Workmen's Compensation Act — Ship moored alongside a quay — "Undertakers" - - - - **409, 420**
See EMPLOYER AND WORKMAN. 5, 6.

SIGNATURE — Promissory note — Signature in blank—Fraudulent negotiation of note by agent—Right of bona fide indorsee for value - - - - - **735**
See NEGOTIABLE INSTRUMENT.

SLAUGHTER-HOUSE — *Licence — Condition — Limitation of Time—Less than Twelve Months—Inralidity—Public Health Acts Amendment Act*, 1890 (53 *&* 54 *Vict. c.* 59), *s.* 29.

By s. 29 of the Public Health Acts Amendment Act, 1890, licences for the use of places as slaughter-houses shall be in force for such time, not being less than twelve months, as the urban authority shall think fit to specify in such licences.

An urban authority granted to the appellant a licence, dated August 22, 1906, by which certain premises were licensed to be used as a slaughter-house "until December 31, 1906." Before December 31, 1906, the appellant applied for, but was refused, the renewal of the licence. The appellant was subsequently convicted for having used the premises as a slaughter-house on February 4, 1907, without having a licence in force:—

Held, that the conviction was wrong, for, there being no power to impose a condition limiting the duration of the licence to less than twelve months, the licence must be read as extending to August 22, 1907. TAYLOR *v.* WINSFORD URBAN DISTRICT COUNCIL **Div. Ct. 396**

2. —— *Licence—Local Government—Towns Improvement Clauses Act*, 1847 (10 *&* 11 *Vict. c.* 34), *s.* 126.

A licence for the use and occupation of a place as a slaughter-house granted under s. 126 of the Towns Police Clauses Act, 1847, is a personal licence, and expires at the death of the licensee, and does not enure for the benefit of subsequent occupiers of the place. GOODWIN *v.* SALE - - - - - - - **Div. Ct. 278**

SOLICITOR — *Costs — Agreement as to Solicitor and Client—Attorneys and Solicitors Act*, 1870 (33 *&* 34 *Vict. c.* 28), *s.* 4.

An agreement by a solicitor with a client to charge him nothing for costs if he won his action, and, if he lost it, to charge only the same amount for costs as he would have recovered from the opposite party had the action been successful, is not an agreement which is required by s. 4 of the Attorneys and Solicitors Act, 1870, to be in writing.

Jennings v. *Johnson*, (1873) L. R. 8 C. P. 425, approved.

Decision of Divisional Court, [1906] 2 K. B. 592, reversed. CLARE *v.* JOSEPH - **C. A. 369**

2. —— *Undertaking to pay Money to Person not Client—Disciplinary Jurisdiction of Court—Summary Order for Payment.*

Where a solicitor in the course of legal proceedings makes a statement to a person even though not his client, that funds have been put into his hands for the purpose of payment to that person upon a certain event happening, and that upon the happening of the event he will pay the money, the personal undertaking of the solicitor is sufficient to enable the Court to exercise its summary jurisdiction to compel him to carry out the undertaking on the application of the person to whom it is given, although it is not a personal guarantee in the sense that the solicitor guarantees the payment of the money out of his (the solicitor's) own pocket.

Further, the Court will exercise its disciplinary jurisdiction to prevent a breach of trust where there has been a declaration of trust by a solicitor in favour of a person even though not his client, which induces that person to alter his position. *In re* A SOLICITOR. *Ex parte* HALES **Div. Ct. 539**

—— Bankruptcy—Solicitor and client—Cash accounts—Draft bills of costs—Proof by solicitor—Trustee in bankruptcy
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—— Costs—Insurance, Marine—Open cover slip — Damages — Fraudulent representations — Reinsurance — Subrogation — Solicitor and client costs - - **814**
See INSURANCE, MARINE. 1.

SPECIAL CASE—Application for service on justices—Summary jurisdiction - **104**
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STAMP—Conveyance on sale—Dissolution of company and reincorporation by same Act—Vesting of property of old company in new - - - - **984**
See REVENUE. 6.

STATUTES:—

Statute De Donis Conditionalibus (Westminster II., 13 Edw. 1, c. 1) - **940**
See REVENUE. 3.

1542.

34 & 35 Hen. 8, c. 20 - - - - **940**
See REVENUE. 3.

1601.

43 Eliz. c. 2, s. 7—*Poor Relief* - - **301**
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STATUTES—*continued.*

1756.

30 Geo. 2, c. x., No. 34—*Private* - - 940
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1766.

7 Geo. 3, c. 37, s. 51—*Local* - - - 764
See RATES. 1.

1797.

38 Geo. 3, c. 5, s. 4—*Land Tax* - - 446
See REVENUE. 5.

1798.

39 Geo. 3, c. lxxxiv.—*Private* - - 940
See REVENUE. 3.

39 & 40 Geo. 3, c. 43—*Public* - - 940
See REVENUE. 3.

39 & 40 Geo. 3, c. ciii.—*Local and Personal* 940
See REVENUE. 3.

1828.

9 Geo. 4, c. 61, s. 15—*Alehouse* - - 526
See LICENSING ACTS. 2.

1830.

11 Geo. 4 & 1 Will. 4, c. 68, ss. 1, 2—*Carriers* 499
See CARRIER.

1833.

3 & 4 Will. 4, c. 74, ss. 15, 18—*Fines and Recoveries* - - - - - 940
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1836.

6 & 7 Will. 4, c. 96, s. 1—*Parochial Assessment* 460
See RATES. 3.

1837.

1 Vict. c. xxxiv.—*Private* - - - 940
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1838.

1 & 2 Vict. c. 110, s. 12—*Judgments* - 437
See SHERIFF. 1.

1842.

5 & 6 Vict. c. 35, s. 146, Sched. E, r. 1—*Income Tax* - - - - - - - 688
See REVENUE. 4.

1844.

7 & 8 Vict. c. 101, s. 35—*Poor Law* - 878
See LOCAL GOVERNMENT. 1.

1845.

8 & 9 Vict. c. 20, s. 140—*Railways Clauses* 578
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1847.

10 & 11 Vict. c. 17, s. 74—*Waterworks Clauses* 578
See WATER. 1.

10 & 11 Vict. c. 34, s. 34—*Towns Improvement Clauses* - - - - - - 278
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1850.

13 & 14 Vict. c. 101, s. 5—*Poor Law* - 301
See POOR LAW. 1.

STATUTES—*continued.*

1852.

15 & 16 Vict. c. 76, s. 212—*Common Law Procedure* - - - - - - - 8
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1854.

17 & 18 Vict. c. 31, s. 7—*Railway and Canal Traffic* - - - - - - 222
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1861.

24 & 25 Vict. c. 100, s. 42—*Offences against the Person* - - - - - - 296
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1863.

26 & 27 Vict. c. 93, s. 12—*Waterworks Clauses* 611
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1867.

30 & 31 Vict. c. 102, s. 3, sub-s. 2; s. 4—*Representation of the People* - - - 668
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1868.

31 & 32 Vict. c. iv.—*Private* - - - 940
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1869.

32 & 33 Vict. c. 67, s. 32—*Valuation (Metropolis)* - - - - - - - 764
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—— —— Sched. III. - - - - 323
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1870.

33 & 34 Vict. c. 28, s. 4—*Attorneys and Solicitors* - - - - - - 369
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33 & 34 Vict. c. 52, s. 3, sub-s. 3; ss. 10, 11—*Extradition* - - - - - - 157
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33 & 34 Vict. c. 75, ss. 7, 74—*Elementary Education* - - - - - - 112
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1871.

34 & 35 Vict. c. 56, s. 2—*Dogs* - - 88
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1872.

35 & 36 Vict. c. 15—*Parks Regulation*—Rules 3 and 4 of the rules made by the Commissioners of Works and Public Buildings - - - - - - - 638
See MOTOR CAR.

35 & 36 Vict. c. 33, Sched. II.—*Ballot Act* 313
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35 & 36 Vict. c. 93, s. 30—*Pawnbrokers* - 101
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—— —— s. 31 - - - - - - 685
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35 & 36 Vict. c. 94, s. 3—*Licensing* - - 237
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—— —— s. 29 - - - - - - 232
See LICENSING ACTS. 1.

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1873.

36 & 37 Vict. c. clxvii., s. 21—*Bradford Improvement* - - - - 385
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1875.

38 & 39 Vict. c. 55, s. 21—*Public Health* 390
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—— —— s. 158 - - - - - 273
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—— —— s. 211, sub-s. 1 (*b*) - - - 256
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38 & 39 Vict. c. 63, s. 25—*Sale of Food and Drugs* - - - - - - 80
See ADULTERATION.

1877.

40 & 41 Vict. c. 43, s. 8—*Justices' Clerks* 526
See LICENSING ACTS. 2.

1878.

41 & 42 Vict. c. 26, ss. 5, 28, sub-ss. 10, 11—*Parliamentary and Municipal Registration* - - - - - - 568
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41 & 42 Vict. c. 77, s. 23 — *Highways and Locomotives* - - - - - 516
See HIGHWAY. 2.

1883.

46 & 47 Vict. c. 52, s. 37, sub-ss. 3, 8; s. 44, sub-s. 2 (iii.)—*Bankruptcy* - - 180
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—— —— s. 58 - - - - - 899
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—— —— s. 74, sub-ss. 3, 6; s. 76 - - 36
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—— —— Sched. II., r. 22 - - - 23
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1885.

48 & 49 Vict. c. 49, Sched., art. vii. — *Submarine Telegraph* - - - 305
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1886.

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1887.

50 & 51 Vict. c. 57, s. 4, sub-s. 2; s. 19—*Deeds of Arrangement* - - - - 170
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1888.

51 & 52 Vict. c. 8, s. 4—*Customs and Inland Revenue* - - - - - 991
See REVENUE. 1.

51 & 52 Vict. c. 41, ss. 57, 59 —*Local Government* - - - - - - 581
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STATUTES—*continued.*

51 & 52 Vict. c. 41, ss. 100, 120 - - 617
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51 & 52 Vict. c. 43, s. 156—*County Courts* 845
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51 & 52 Vict. c. 59, s. 8, sub-s. 1 (*b*)—*Trustees* - - - - - - - 350
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1889.

52 & 53 Vict. c. 45, s. 2, sub-s. 1—*Factors* 50
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1890.

53 & 54 Vict. c. 45, s. 11—*Police* - - 591
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53 & 54 Vict. c. 59, s. 29—*Public Health* 396
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53 & 54 Vict. c. 71, s. 8, sub-ss. 2 (iv.), 8—*Bankruptcy* - - - - 166
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1891.

54 & 55 Vict. c. ccxxii., s. 6—*Great Western Railway Company (Rates and Charges Provisional Order Confirmation Act)* - - - - - - 664
See RAILWAY. 4.

1892.

55 & 56 Vict. c. 13, s. 3—*Conveyancing and Law of Property* - - - 494
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55 & 56 Vict. c. 57, s. 6—*Private Street Works* - - - - - 130
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—— —— ss. 7, 8 - - - - - 96
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1893.

56 & 57 Vict. c. 71, s. 26—*Sale of Goods* - 333
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56 & 57 Vict. c. 73, ss. 36, 42—*Local Government* - - - - - - 581
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1894.

57 & 58 Vict. c. 39, ss. 2, 5, sub-s. 5—*Finance* - - - - - 940
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57 & 58 Vict. c. 54, s. 1—*Railway and Canal Traffic* - - - - - - 191
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57 & 58 Vict. c. ccxiii., s. 22; s. 200, sub-s. 3 (*a*) —*London Building* - - - 45
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See LONDON. 1.

—— —— s. 88, sub-s. 6; s. 91 - - 822
See LONDON. 3.

1895.

58 & 59 Vict. c. 16, s. 12—*Finance* - 984
See REVENUE. 6.

STATUTES—*continued.*

1896.

59 & 60 Vict. c. 48—*Light Railways* - **991**
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—— —— s. 12, sub-s. 2 - - - - **256**
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1897.

60 & 61 Vict. c. 37, ss. 1, 7, sub-ss. 1, 2—*Workmen's Compensation* - - - **409**
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—— —— Sched. I., clause 1 (*a*), (*i.*) - **433**
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1898.

61 & 62 Vict. c. 29, s. 12, sub-s. 1—*Locomotives* - - - - - - - **516**
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61 & 62 Vict. c. cxxxvii., s. 74—*London Building* - - - - - - **45**
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1900.

63 & 64 Vict. c. 51, s. 1, sub-s. 3—*Moneylenders* - - - - - - **868**
See BANKRUPTCY. 8.

1901.

1 Edw. 7, c. 22, s. 104—*Factory and Workshop* - - - - - - - **409**
See EMPLOYER AND WORKMAN. 5.

—— —— s. 149 - - - - - **315**
See FACTORY.

1 Edw. 7, c. 27, s. 2—*Intoxicating Liquors, Sale to Children* - - - - - **513**
See LICENSING ACTS. 5.

1902.

2 Edw. 7, c. 42, s. 18, sub-s. 1 (*c*)—*Education* - - - - - - - **756**
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1903.

3 Edw. 7, c. 18, ss. 2, 3—*Pistols* - - **380**
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3 Edw. 7, c. 36, s. 4—*Motor Car* - - **638**
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1904.

4 Edw. 7, c. 23, s. 1, sub-s. 2—*Licensing Acts* **340**
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See LICENSING ACTS. 1.

1905.

5 Edw. 7, c. 13, s. 4—*Aliens* - - - **997**
See ALIEN.

STOWAWAY — Undesirable alien — Expulsion order — Liability of master of ship bringing alien to the United Kingdom **997**
See ALIEN.

STREETS—*Channelling—By-laws—Validity of—Reasonableness—Uncertainty—Local Government—Construction of New Streets.*

A by-law of a local authority dealing with the construction of new streets provided that in all cases where the street was of a certain width the person constructing it should make on each side of it "a proper channel not less than twelve inches wide and six inches deep either of granite cubes laid on a bed of cement concrete at least six inches in thickness or otherwise in a suitable manner and with suitable materials":—

Held—(1.) that the fact that the by-law did not give any power to the person constructing the street to object before some independent tribunal that the requirement was unnecessary in the circumstances of the particular case did not make the by-law bad as being unreasonable; (2.) that the liberty of making the channel in another manner, and of other materials than those specified, did not make the by-law bad for uncertainty. LEYTON URBAN DISTRICT COUNCIL *v.* CHEW - - - - **Div. Ct. 283**

2. —— *Private Street Works—Objections—Determination by Court of Summary Jurisdiction—Right of Appeal to Quarter Sessions—Local Government—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 7, 8.

An appeal lies to quarter sessions from the decision of a Court of summary jurisdiction under s. 8 of the Private Street Works Act, 1892, determining the matter of objections to proposed works under the Act. PEARCE *v.* MAIDENHEAD CORPORATION - **Div. Ct. 96**

3. —— *Private Street Works—Provisional Apportionment—Premises fronting, adjoining, or abutting on Street—Lands extra commercium—Local Government—Public Health Acts—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *s.* 6—"*Owner.*"

A provisional apportionment of the estimated expenses of private street works made under s. 6 of the Private Street Works Act, 1892, is defective and may be successfully objected to under s. 7 of the Act if it does not include all the premises fronting, adjoining, or abutting on the street the subject of the private street works, irrespective of the question how much, if anything, is ultimately charged upon some of the premises.

Lands acquired by an urban authority under s. 164 of the Public Health Act, 1875, to be used as public walks or pleasure grounds are not extra commercium. The urban authority is the "owner" of such lands within the meaning of the Public Health Acts. HERNE BAY URBAN DISTRICT COUNCIL *v.* PAYNE AND WOOD **Div. Ct. 130**

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See under TELEGRAPH.

SUBROGATION — Insurance, Marine — Open cover slip—Damages—Fraudulent representations—Reinsurance—Costs **814**
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SUMMARY JURISDICTION.
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SUMMARY JURISDICTION RULES, 1886, r. 18.
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SUNDAY—Ship—Charterparty—Lay days—Exception of Sundays and holidays - 705
See SHIPPING.

SURCHARGE — Auditor—Certiorari—Right of Court to review surcharge - - 878
See LOCAL GOVERNMENT. 1.

SURGEON—Water for motor car used for profession of physician and surgeon — Supply for domestic purposes - 611
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SURVEYORS — London—Party wall—Compensation for damage to trade—Jurisdiction of surveyors - - - - 822
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See under REVENUE.

TELEGRAPH — *Submarine Telegraphs Convention—Protection of Cables—Fouling of Cable by Anchor—Sacrifice of Anchor—Compensation—Measure of Damages—Submarine Telegraph Act*, 1885 (48 & 49 *Vict. c.* 49), *Schedule, art. vii.*

The Submarine Telegraph Act, 1885, Schedule, art. vii., provides that shipowners who can prove that they have sacrificed (inter alia) an anchor in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable :—

Held, that the liability of the owner of the cable under this article was to make compensation for the sacrifice of the anchor, but not further to pay the damages resulting from such sacrifice.

Semble, the amount of compensation is not necessarily limited to the cost of replacing the material sacrificed, but depends on the circumstances of each case. AGINCOURT STEAMSHIP CO., LD. *v.* EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH CO., LD. - C. A. 305

TENANT—Landlord and.
See under LANDLORD AND TENANT.

TIME — Highway — Repair — "Extraordinary traffic" — Limitation of time for bringing action - - - - 516
See HIGHWAY. 2.

—— Limitation of time for bringing action—Extraordinary traffic—Repair of highway—Recovery of expenses - 39
See HIGHWAY. 3.

—— Slaughter-house — Licence — Condition — Limitation of time - - - 396
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TOWNS IMPROVEMENT CLAUSES — Local government—Slaughter-house—Licence
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TRADER — Auctioneer — Partnership — Bill of exchange—Implied authority to accept
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TRESPASS — *Damages — Remoteness — Fowls straying on Highway—Damage to Passenger—Liability of Owner.*

The plaintiff was riding a bicycle on a highway upon the footpath of which were some fowls belonging to the defendant. As the plaintiff got abreast of the fowls a dog belonging to a third person frightened the fowls, one of which which flew into the spokes of the machine, causing it to upset, whereby the plaintiff suffered personal injury and the bicycle was damaged :—

Held, that even if the fowl was not lawfully on the highway the circumstances under which the accident happened prevented the damage from being the natural consequence of its presence there, and that the plaintiff could not recover.

Quære whether the occupiers of land adjoining the highway are not entitled to allow their poultry to stray about the highway? HADWELL *v.* RIGHTON - - - - - Div. Ct. 345

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It is not a condition precedent to the right of a water company to recover a water rate under s. 74 of the Waterworks Clauses Act, 1847, that the water company should have exercised the power of cutting off the water conferred by that section. THE KING *v.* HUTTON. *Ex parte* METROPOLITAN WATER BOARD - **Div. Ct. 578**

2. —— *Supply for Domestic Purposes — Water for Motor Car used for Profession of Physician and Surgeon—Waterworks Clauses Act*, 1863 (26 & 27 *Vict. c.* 93), *s.* 12.

Water supplied to and used by a medical man for washing a motor car and for other purposes in connection therewith, the motor car being used by him for the purposes of his profession or business of a physician and surgeon, is water supplied for domestic purposes within the meaning of s. 12 of the Waterworks Clauses Act, 1863. HARROGATE CORPORATION *v.* MACKAY **Div. Ct. 611**

WATER-CLOSETS—*Local Government — Local Authority — Power to Order Substitution of Water-closets for existing Privies—Bradford Improvement Act*, 1873 (36 & 37 *Vict. c. clxvii.*), *s.* 21.

A local Act provided that the corporation of the borough might "in any case where a dwelling-house within the borough shall be without a privy, water-closet or earth-closet, or an ashpit, or without a privy, water-closet or earth-closet, or an ashpit of a construction and size approved by the corporation, require the owner of such house by notice under the hand of the mayor or town-clerk for the time being to provide such a privy, water-closet or earth-closet or such an ashpit, or to make such reparation or alteration of the existing privy, water-closet or earth-closet, or ashpit as in such notice shall be stated":—

Held, that under that provision the corporation were entitled to require the owner of houses, which were already provided with privies, to substitute water-closets for the privies, although the privies, as such, were of good construction and sufficient for the needs of the houses.

Held, also, that they were entitled to require the provision of a separate water-closet for each house. SMITH *v.* GREENWOOD - **Div. Ct. 385**

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